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In the
Supreme Court of the United States

THOMAS F. PAGE,

Petitioner,

vs.

STEVEN B. SCHULTZ,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, for purposes of granting a writ of habeas corpus pursuant to 28 U.S.C. §2254, the opinion of a state court which cited to and applied the admittedly relevant precedent of the United States Supreme Court can be said to be contrary to that precedent?

2. Whether the state court's determination that the habeas petitioner had not been entitled to the appointment of a mental health expert pursuant to *Ake v. Oklahoma*, 470 U.S. 68 (1985), was an unreasonable application of *Ake* where the petitioner had been found fit for trial, he did not have an extensive history of mental illness, he took several purposeful actions to hide his involvement shortly after he killed a woman, and where a psychologist testified that the petitioner's one prior diagnosis of bipolar disorder had been based on incomplete information and defense counsel never stated that a defense of insanity would or could be raised?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT:

Certiorari Should Be Granted Because, By Finding a State's Court's Application Of The Relevant Precedent Was Contrary To That Precedent And By Finding That The State Court's Plausible Result Was Unreasonable, The Seventh Circuit's Holding Conflicts With This Court's Explanation Of "Contrary To" and "Unreasonable" in *Williams v. Taylor*, 529 U.S. 362 And This Court's Explanation Of The Proper Deference Owed To A State Court's Opinions As Set Forth In *Early v. Packer*, ___ U.S. ___, 123 S.Ct. 362 (2002) and *Woodford v. Visciotti*, ___ U.S. ___, 123 S.Ct. 357 9

CONCLUSION 22

APPENDIX ..... *infra*

TABLE OF AUTHORITIES

United States Supreme Court Cases PAGE(S)

Ake v. Oklahoma,
470 U.S. 68 (1985) ..... *passim*

Early v. Packer,
___ U.S. ___, 123 S.Ct. 362, 365 (2002) 9, 11

Strickland v. Washington,
466 U.S. 668 (1984) 21

Williams v. Taylor,
529 U.S. 362 (2000) 9, 20-21

Woodford v. Visciotti,
___ U.S. ___, 123 S.Ct. 357, 360 (2002) 20-21

Other Cases

People v. Kegley, 175 Ill.App.3d 335,
529 N.E.2d 1118 (2nd Dist. 1988) 19

Federal Statutes

28 U.S.C. §2254 9

Additional Authority

Schultz v. Page,
313 F.3d 1010 (7th Cir. 2002) ..... *passim*

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered on December 19, 2002.

OPINIONS BELOW

The December 19, 2002 decision of the United States Court of Appeals for the Seventh Circuit is published at 313 F.3d 1010 (7th Cir. 2002). A copy of this decision is included in the appendix to this petition. A copy of the February 20, 2002 unpublished order of the United States District Court for the Southern District of Illinois is also included in the appendix to this petition. A copy of the September 21, 2000 report and recommendation of the United States Magistrate Judge is also included in the appendix to this petition. A copy of the September 28, 1998 unpublished order of the Illinois Appellate Court, Second District, is also included in the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on December 19, 2002. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The United States District Court for the Southern District of Illinois, East St. Louis Division asserted jurisdiction under 28 U.S.C. § 2254. The United States Court of Appeals for the Seventh Circuit exercised jurisdiction under 28 U.S.C. §§ 1291 and 2253. Petitioner, Warden Thomas Page, appealed from a final judgment of the District Court which rejected the report and recommendation of a magistrate judge and granted Steven Schultz's petition for a writ of habeas corpus by a person in state custody.

On November 14, 1995, Schultz, was charged by information filed in the Circuit Court of Boone County, Illinois with two counts of first-degree murder. (C. 13) Before trial, on May 1, 1996, defense counsel filed a motion to have Schultz examined to determine if Schultz was fit to stand trial. (C. 88) The next day, the trial court appointed Dr. Terrance Lichtenwald to conduct a fitness evaluation. (C. 89; R. 298-304)

Also on May 2, 1996, defense counsel filed a motion to have Schultz examined as to his sanity at the time of the crime. The motion alleged that on May 2, defense counsel had received supplemental discovery from the Janet Wattles Health Center which raised a *bona fide* doubt as to Schultz's sanity. (C. 90-1) Attached to that motion was a letter from Wattles to John Hare of the Boone County Jail which stated that Joan Lodge of Wattles had examined Schultz because he had complained of seeing bugs and worms. (C. 93) Lodge reported that her examination revealed that Schultz had been depressed, and complained of little motor activity, little concentration and sleeplessness. Lodge also reported that Schultz's sister had been treated for depression and that the maternal side of Schultz's family had a history of depression and suicide. (C. 93) Lodge indicated that Schultz had been hospitalized for psychiatric reasons for two weeks in 1994. (C. 93) At

that time, Schultz had complained of similar symptoms and had been prescribed Depakote and Prozac. Lodge suggested that Schultz now be given the same medications. (C. 93) The motion did not rely on a defendant's constitutional due process right to the appointment of a mental health expert and did not cite to the United States Supreme Court case of *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985). Rather, the motion was based on 725 ILCS 5/115-6 (West 1996), which is an Illinois statute regarding the appointment of a psychiatrist or clinical psychologist when it appears that certain defenses relative to mental state might be raised at trial. (C. 90-1) The court entered an order appointing Dr. Terrance Lichtenwald to conduct a fitness evaluation. (C. 89)

A hearing was held on fitness on May 3, 1996. A medical doctor, Kent Hess, testified that he received a letter from Wattles on or about April 24 or 25, 1996, describing Schultz's medical history and recommending that the medications he had been prescribed be restarted. Hess said that Prozac is an anti-depressant and that Depakote had been used as an anti-seizure medication for epilepsy but had more recently been prescribed for manic depression, a condition in which the patient has mood swings from euphoria to depression. According to Hess, Prozac takes from four to six weeks to take effect. (The prosecutor stated in open court that the medications were not actually started until April 30.) Hess opined that at the time of the hearing, the Prozac would have had no effect. (R. 310-21) Depakote, according to Hess, was utilized to bring down the "highs" associated with manic depression. He had no idea of the time it would take to have an effect. (R. 321-3)

John Hare testified that he was a supervisor at the Boone County Jail and that, on March 11, Schultz had reported seeing bugs and worms, and sleeplessness during his entire incarceration. (R. 326-7) Hare corroborated

that the medication described by Hess was begun on April 30. (R. 328)

Dr. Terrance Lichtenwald testified that he had been appointed the previous day to examine Schultz on the fitness issue. He called the State's Attorney's office to obtain police reports and then went to the jail and provided Schultz with paper and pencil tests. In the meantime, he read police reports. He subsequently interviewed Schultz, around 2:30 or 3:00 until around 8:30. He agreed that he came to be involved in a "hasty" manner. He said that he normally liked to spend quite a few hours reading the behavioral science data. A representative of Wattles had earlier read reports to him from Riverside Medical Center in Kankakee over the phone. (R. 328-9)

Lichtenwald testified that he was aware that Schultz had been admitted to Riverside in 1994 on an inpatient basis complaining of being in an agitated state, physical abuse, and auditory hallucinations. Lichtenwald stated that Schultz had been neglected by his mother because she was busy frequenting taverns. As a result, Schultz was raised primarily by his sister. Schultz had been physically abused by his natural father. Upon Schultz's discharge from Riverside, he did not continue taking the prescribed medications (Prozac and Depakote). Lichtenwald concluded that Schultz was fit to stand trial and that his emotional responses were consistent with his legal situation. (R. 340-4; 347-9; 354)

Upon examination by the prosecutor, Lichtenwald stated that he considered his examination complete and that he had spent more time with Schultz than he had originally intended. In his opinion, Schultz may not even have had a bipolar disorder. Lichtenwald said that there had been a shift in complaints by Schultz. In 1994 Schultz had complained of auditory hallucinations, now, they were visual. In addition, Schultz's complaint of seeing bugs turned to

seeing dots. Lichtenwald testified that the complaints of hallucinations were "inconsistent with known presentations . . . of schizophrenia or hallucinations associated with bipolar disorder." According to the so-called PANSS test (apparently, the Positive and Negative Test for Schizophrenia), Schultz displayed no symptom of the disease with the exception of hallucinations. (R. 354-60) Upon examination by the court, he stated that Schultz did not manifest any psychiatric disorder. When the court asked Lichtenwald about whether the reference in Lodge's report from Wattles about hallucinations of bugs and worms indicated a disorder, Lichtenwald stated that they did not. (R. 362) Lichtenwald testified that the complaint about seeing dots may have been attributable to dust in the Schultz's eyes. (R. 362-3) He concluded that he was "certain" that Schultz was fit. (R. 364)

On further examination by defense counsel, Lichtenwald admitted that Schultz was presently complaining of the same problems that led to his 1994 hospitalization. Lichtenwald suggested that Schultz's symptoms might be detoxification from alcohol. He admitted that Dr. Hess' testimony regarding Prozac and Depakote was correct. He acknowledged that whoever treated Schultz in Kankakee thought that the drugs were necessary, that Wattles had recommended restarting the medications, and that, accordingly, there was some substance to the complaints about bugs and worms. Lichtenwald then stated that the complaint of bugs and worms "could be part of some brain injury. It could be the detoxing from God knows—all the chemicals, and it could be part—some malingering and deception too." (R. 365-8) He conceded that if he had had the time, he would have investigated childhood trauma. He stated, "I would have given a couple more tests, but eventually you're going to have to go neurological, neuropsych, get a neuro, boarded neuropsych." (R. 369)

Upon examination by the prosecutor, Lichtenwald said that some of Schultz's agitation may have been attributable to friction he was experiencing with another inmate. (R. 369-70)

That concluded the testimony of the fitness hearing. In the ensuing argument, the prosecutor stated that he believed Schultz was fit because the only expert to testify on the matter so concluded. Defense counsel responded that Lichtenwald's opinion is not conclusive because, had he had more time, perhaps some questions could be answered. Defense counsel wanted the court to reserve ruling until the unanswered concerns of Lichtenwald had been addressed. The court asked defense counsel what those concerns were and counsel responded that the hallucinations had variously been ascribed to specks of dirt, detoxification, and brain trauma. Defense counsel stated that he feared that Schultz could experience these symptoms during the trial. The trial court, at this juncture, stated that it would be appropriate to address Schultz's motion for the appointment of an expert on the sanity/insanity question. (R. 371-3)

The court asked defense counsel whether he had given notice of his intent to rely on an insanity defense. Defense counsel responded that he had not because he was "in the dark." He added that his motion for an examination on the issue of insanity was filed the very same day he had learned of Schultz's psychiatric hospitalization through the Wattles letter supplied to him in discovery. The prosecutor conceded that the defense counsel had been "totally diligent." (R. 373-6)

The court stated that the issue was whether the "circumstances of the case justify reasonable belief the aforesaid defense may be raised." The court was apparently reading from an Illinois statute which sets forth circumstances when a psychiatrist or clinical psychologist should

be appointed. *See* 725 ILCS 5/115-6 (West 1996). Defense counsel stated that, from "what we have heard," he had a good faith belief the defense may be raised. The trial judge stated that the real issue was the definition of insanity. The parties consulted the Criminal Code on the question, following which the prosecutor said on the record that he "surmis[ed]" from Lichtenwald's testimony that there was no basis to believe that Schultz could raise insanity. He also opined that, from a strategic standpoint, "this would be a tragic choice of a defense." (R. 376-8) The trial judge stated that it was his recollection from Lichtenwald's testimony that he had never used the term "mental illness" and had considered that Schultz had been diagnosed with bipolar disorder. (R. 379) Defense counsel stated that he was concerned that the diagnosis of Riverside predated the offense. The court responded that the "difficulty with that" was that the diagnosis also included substance dependency and not mental illness. Defense counsel reminded the court that Riverside had prescribed psychotropic medications. The court continued the case a short time so that he could examine the case law relevant to the Illinois statute in question before rendering a decision. (R. 381)

When the trial judge returned, he recounted Lichtenwald's testimony. He stated that from all the evidence, it was "very clear" that Schultz was fit. (R. 383) Addressing the appointment of an expert on the sanity question, the court remarked that there had been no notice of an insanity defense, and that from Lichtenwald's testimony, there was no reasonable basis for a belief that such a defense could be raised. (R. 384) The court denied the motion for the appointment of an expert on the sanity question. (R. 385) Defense counsel pressed the court for clarification of the trial court's rationale, especially as to whether the trial court was grounding his decision on the lack of notice. The court responded that it was "follow-

ing the statute" and that Lichtenwald had "already done all the work." Defense counsel, apparently still unclear as to the basis of the trial court's ruling, asked again for a clarification. The court stated that it was "ruling on the reasonable basis aspects of the statute." (R. 385-6)

On appeal, the Illinois Appellate Court denied Schultz's claim that a psychiatrist should have been appointed under *Ake v. Oklahoma* and/or 715 ILCS 5/115-6. (Appendix, pp. 56-61)

Schultz filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. Following the submission of further pleadings by the parties, a United States Magistrate Judge issued a report and recommendation which stated that the habeas petition should be denied. Schultz filed objections to the report and recommendation. The District Court subsequently issued an order which granted the writ of habeas corpus and remanded the cause to the Illinois Circuit Court for further proceedings. Respondent appealed from the judgment of the United States District Court for the Southern District of Illinois which granted Schultz's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254.

After full briefing and oral argument, the United States Court of Appeals for the Seventh Circuit affirmed the order of the District Court. In doing so, the Court of Appeals ruled that the state appellate court decision was contrary to this Court's precedent because the state court had reached a conclusion opposite to that reached by this Court on a question of law. The Court of Appeals also held that the decision of the state appellate court was an unreasonable application of *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985). Respondent did not seek rehearing.

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted Because, By Finding a State Court's Application Of The Relevant Precedent Was Contrary To That Precedent And By Finding That The State Court's Plausible Result Was Unreasonable In Light Of That Precedent, The Seventh Circuit's Holding Conflicts With This Court's Explanation Of "Contrary To" and "Unreasonable" in _Williams v. Taylor_, 529 U.S. 362 And This Court's Explanation Of The Proper Deference Owed To A State Court's Opinions In _Early v. Packer_, 123 S.Ct. 362 (2002) and _Woodford v. Visciotti_, 123 S.Ct. 357 (2002).

Under the applicable statute, a federal court will not grant a writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court unless that adjudication resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by this Court, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1518 (2000) (*citing* 28 U.S.C. §2254(d)(1)). For purposes of this analysis, the statute refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision. *Williams*, 120 S.Ct. at 1523.

A state court opinion can be "contrary to" clearly established federal law in one of two ways. First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. In other words, as this Court recently stressed, a state court decision is contrary to this Court's precedent "if it 'applies a rule that contradicts the governing law set forth in [this Court's] cases.'" *Early v. Packer*, ___ U.S. ___, 123 S.Ct. 362, 365 (2002).

Second, a state-court decision is contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant case decided by this Court and arrives at a result opposite to that reached by this Court. *Id.* at 1519-20, 1523.

In the instant case, the Court of Appeals specifically stated that it was applying only the first of these "contrary to" standards. (Appendix, p. 9) The Court of Appeals then correctly noted that in *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985), this Court had held that an indigent defendant is entitled to have a psychiatrist appointed to assist in his defense if the defendant shows that his sanity at the time of the crime will be a significant factor at trial. (Appendix, p. 9) Notably, in its decision, the Illinois Appellate Court had likewise correctly cited to *Ake*. The state court noted that, in *Ake*, this Court had held that an indigent defendant has a constitutional right to appointment of a psychiatrist where that defendant makes a preliminary showing that his sanity is a significant factor. (Appendix, p. 58) The state court then held that the rule of *Ake* was inapplicable because, in this case, the defendant's sanity was never a factor, much less a significant factor. (Appendix, p. 58) Thus, it is clear that the state court applied the correct precedent of this Court to the defendant's claim that he was entitled to the appointment of a psychiatrist in order to assist him regarding a possible defense of insanity. It had certainly not applied a rule which contradicts that of *Ake*.

Indeed, the state court applied the exact law of *Ake* which the Court of Appeals had cited. However, the Court of Appeals ruled that the state court decision was contrary to *Ake* because the Court of Appeals took issue with the factors upon which the state court relied in conducting its *Ake* analysis. (Appendix A, pp. 9-12) This was wrong for, at least, two reasons. First, in *Ake*, this

Court specifically stated that it expressed no opinion as to whether any of the factors it used to determine that Ake was entitled to the appointment of a psychiatrist were necessary to its finding. *Ake*, 470 U.S. 68 at 86. Also, this Court did not indicate any factors which it determined would not be relevant. *See generally Ake*, 470 U.S. 68. Thus, the Court of Appeals disagreement with the factors used by the state court is no more than a subjective dislike not based upon anything set forth by this Court. Second, this Court has recently stressed that, to avoid being contrary to this Court's precedent, a state court opinion need not cite to or even be aware of the appropriate precedent of this Court. *Early*, 123 S.Ct. at 362. Rather, all that is required is that neither the reasoning nor the result of the state court decision contradicts that precedent. *Id.* Here, where the state court set forth and applied what the Court of Appeals agreed is the appropriate standard, the state court clearly did not contradict the governing standard laid down by this Court. Therefore, the Court of Appeals erred when it determined that the state court's opinion is contrary to this Court's precedent.

The Court of Appeals also overstepped the bounds of its habeas review when it determined that the state court opinion was contrary to this Court's precedent of *Ake*. In *Ake*, this Court determined that a state has a due process duty under certain circumstances to provide an indigent defendant with a psychiatrist to aid the defendant in evaluating, raising and presenting a defense of insanity at trial. Specifically, a state must assure a defendant access to a competent psychiatrist when that defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial. *Ake*, 470 U.S. at 74, 82-83. At other places in that opinion, this Court couched its language in terms of whether a defendant's sanity at the time of the offense

is seriously in question or is to be a substantial factor in his defense. *Id.* at 70, 82, 86. In *Ake*, this Court relied on the following factors when it determined that Ake had met his burden of demonstrating that his mental state at the time of the offense was to be a significant factor in his defense:

> For one, Ake's sole defense was one of insanity. Second, Ake's behavior at arraignment, just four months after the offense, was so bizarre as to prompt the trial judge, *sua sponte*, to have him examined for competency. Third, a state psychiatrist shortly thereafter found Ake to be incompetent to stand trial, and suggested that he be committed. Fourth, when he was found competent six weeks later, it was only on the condition that he be sedated with large doses of Thorazine three times a day. Fifth, the psychiatrist who examined Ake for the competency described to the trial court the severity of Ake's mental illness less than six months after the offense in question, and suggested that his mental illness might have begun many years earlier. Finally, Oklahoma recognizes a defense of insanity, under which the initial burden of producing evidence falls on the defendant. Taken together, these factors make clear that the question of Ake's sanity was likely to be a significant factor in his defense.

Ake, 105 S.Ct. at 1098. Of these six factors, only one is clearly present in this case and another is, arguably, present to a significantly lesser degree.

Like Oklahoma, Illinois recognizes a defense of insanity under which a defendant bears the burden of producing evidence. *See* 720 ILCS 5/3-2, 5/6-2 (West 1995).

Although this Court did not elaborate on the exact nature of Ake's "bizarre" behavior, it was so bizarre as to

prompt the trial judge, *sua sponte*, to order that Ake be examined for competency purposes. *Ake*, 470 U.S. at 71, 86. The Court of Appeals here relied on Schultz's behavior when he was arrested, when he tendered his confession and when he testified before the trial court. The most apparent difference between this case and *Ake* is that, whatever the Court of Appeals thought of Schultz's behavior without having viewed any of the actions firsthand, that behavior was not so bizarre as to cause the trial judge to, without being asked, order that Schultz be examined regarding his competency for trial.

Moreover, the actions which concerned the Court of Appeals are hardly peculiar behavior for a person being investigated for, and later charged with, murder. The Court of Appeals specifically noted that Schultz said that the victim asked him to choke her to death and said that he had been promised that he would be released if he confessed. (Appendix A, p. 12) Neither of these statements is bizarre. It is certainly not uncommon for a perpetrator to assert alleged facts in order to appear less or not culpable. In this regard, Schultz told several lies shortly after the murder while trying unsuccessfully to cash checks on which he had forged the victim's name at three branches of a local bank. (R. 840-47, 854-61, 866-70, 875-79, 884-95, 903-09) Schultz then tried to cover up his participation in the death.

Schultz contacted other acquaintances, said the victim had kicked him out, that he needed to get some of his property and asked them to meet him at the victim's trailer home, where they banged on doors and windows in an attempt to get somebody's attention. (R. 932-35, 952-55, 1048-53, 1104-08, 1123-30) When there was no answer, the police were called. (1053, 1107) While waiting for the police, Schultz suggested to the two persons with him that he identify himself to the police using the last name of one of those persons rather than his own. (R.

1053, 1108) The Police arrived, eventually broke into the trailer and found the victim's body. (R. 1175-84, 1196-99).

When the police subsequently questioned him, Schultz did not tell them about his attempts to cash checks made out to him from the victim's account. (R. 929-35) When he was told that the police knew of these efforts, Schultz admitted that he had lied and that a black man named "Jerome" had asked Schultz to cash the checks in return for $25. (R. 942-45) Eventually, Schultz admitted that he had killed the victim after she had held an 8-12 inch long kitchen knife to his throat in an attempt to force Schultz to have sex with her. Schultz claimed that when he then dropped to the floor crying, the victim picked up a cord or wire which he then took from her and used to choke her. When he stopped choking her, the victim allegedly asked him to choke her so that she could be with her dead mother. He claimed to have then choked her until sometime after she dropped the knife and passed out. (R. 945-50, 959-61) Schultz said that he did not remember if he had tied the victim's wrists and ankles. (R. 967-68)

These claims by Schultz were strongly contradicted by the physical evidence. The victim was found with the knotted cord still wrapped tightly around her neck. (R. 1181, 1200) The police crime scene technician testified that, in addition to the cord around her neck, the victim's wrists were tied tightly together and behind her with another cord, her ankles were tied tightly together with another cord and the cords tying her wrists and ankles were also tied together. (R. 1213-14) In addition, the cord tied around the victim's neck was tied to one of the bedposts of the bed on which the body was found. (R. 1215-16) These cords were not just wrapped around the victim but were secured by several knots. (R. 1216) Also, the victim was bruised around the right eye and had a circular bruise on her left breast and chest.

(R. 1214) The head of a plastic mallet found near the bed was consistent with the size of the circular bruise. (R. 1214-15) It was later discovered that Schultz's fingerprints were on this mallet. (R. 1378-890)

The forensic pathologist who performed the autopsy on the victim also stated that the head of the mallet was consistent with the size of the bruise on the victim's breast. (R. 1311) The victim also had bruises on her forehead, right eye, the back of her right hand and her elbows. (R. 1307-11) It was the pathologist's opinion that the bruises had been inflicted before the victim's death. (R. 1309) The bruises on the right hand were consistent with defensive wounds. (R. 1329-30) As with the bruises, the pathologist opined that the victim's wrists and ankles had been bound behind her before her death. (R. 1306, 1335-36) The cause of death was ligature strangulation. (R. 1323)

There is further evidence that Schultz attempted to hide the crime and reduce his culpability. One of the officers who discovered the victim's body testified that the temperature in the trailer was cool and there were towels stacked in front of a vent in the door to the bedroom in which the body was found. (R. 1180-81) Schultz admitted that he turned down the thermostat in the trailer to reduce the smell of the body. (R. 967) One of the acquaintances who originally went to the trailer when Schultz reputedly could not find the victim testified that Schultz told her that Schultz had made up the story about the victim having a knife because he "needed something quick." (C. 1098-99)

In sum, Schultz told one lie after another following his murder of the victim. He told these lies to bank workers, acquaintances and the police. When a lie failed he simply made up another in order to protect himself. In this context, Schultz's story regarding the victim's wish

to die can hardly be regarded as bizarre or even unusual. It was simply another in a long list of unsuccessful lies. In the same way, Schultz's claim that he was told that he would be set free was obviously no more than a further attempt to have his damning statement to police suppressed. Here, rather than simply make up a story, Schultz hoped to successfully embellish on an officer's statement that, if Schultz told the truth, the officer would stand by Schultz when the officer spoke to the State's Attorney. (R. 998-1003) Thus, this factor, present in *Ake*, is also not present in the instant case.

In addition, unlike in *Ake*, insanity was not Schultz's sole defense, or his intended defense at all. At trial, Schultz raised a claim of self-defense and the unreasonable belief in a need for self-defense (which would lead to a conviction for the lesser mitigated offense of second degree murder) based upon the alleged sexually motivated attack by the victim. (R. 829-32, 1500-47, 1606-40) Schultz had laid the foundation for this claim as soon as he realized that the police were not buying his story that he had nothing to do with the killing.

Next, unlike Ake, Schultz was never found incompetent to stand trial. (R. 340-44, 347-49, 354; C. 187p)

Also unlike Ake, Schultz's fitness for trial was never tied to his being given Prozac and Depakote. Dr. Lichtenwald did recommend that Schultz continue on these two medications. (C. 187q) However, he also recommended cognitive therapy and behavioral management. (C. 187q) He recommended that the treatment plan take into account the possible threat of violence to others, sexual acting-out, alcohol abuse, drug abuse, manipulative behavior, anti-social behavior and threats of early termination. However, nowhere in his report did he state that Schultz's fitness for trial was in any way dependant upon his continued use of Prozac and Depakote. (C. 187a-187q) More-

over, Dr. Kent J. Hess, who also testified at the fitness hearing, stated that Prozac does not take affect for four to six weeks. (R. 316) Therefore, because Schultz had begun taking Prozac only four days before the hearing (which was only three days before he was examined by Dr. Lichtenwald), that drug would not yet have had any effect on Schultz. (C. 318-19, 328) Thus, Schultz's fitness for trial could not have been dependant on that drug. Dr. Hess testified that he did not know how long it would take Depakote to have an effect on a person. (R. 323) Nevertheless, Respondent notes that Schultz also began taking Depakote only three days before he was examined by Dr. Lichtenwald. (R. 328)

Finally, Dr. Lichtenwald's report and testimony did not indicate that Schultz was suffering from a severe mental illness or that any such mental illness was of long standing. Dr. Lichtenwald found no indication of schizophrenia or of any other psychiatric or psychotic disorders. (R. 360-61, C. 187H-187p) In relation to the symptoms indicated in the letter from Joan Lodge of the Wattles Center, Dr. Lichtenwald stated that Schultz was sad but that there were no full major depressive features evident. (R. 347) Schultz denied current feelings of depression; he denied any motor retardation or sleep disturbance. (C. 187f) Dr. Lichtenwald stated that Schultz's complaint of seeing "dots" was probably not a psychological issue. (C. 345) These visual complaints do not match with the psychiatric definition of hallucinations. (R. 344, 360) Dr. Lichtenwald noted that Schultz had reported no delusional symptoms associated with these visual stimuli and did not report being disturbed by them. (C. 187f, 187j) Dr. Lichtenwald likewise indicated that a report of seeing "bugs and worms" would not indicate a disorder. (R. 362-63) In fact, Dr. Lichtenwald found no indications of the presence of delusions. (C. 187f) He opined that Schultz's problem in this area might well

be mechanical and that Schultz should perhaps be referred to an ophthalmologist. (R. 344, 363) He also noted that the cause of the visual stimuli is suspect since Schultz's present symptoms did not start until Schultz was incarcerated in the Boone County Jail. (R. 347, 360, 369; C. 187f) In addition, Dr. Lichtenwald noted that Schultz had a significant history of alcohol and drug abuse, and that such visual stimuli can be a common side effect of detoxification. (R. 358-59, 366-68; C. 187g, 187m) Dr. Lichtenwald's diagnosis was of alcohol dependence, adjustment disorder, anxious and depressed mood, antipersonalty disorder and various learning disorders. (R. 347, 362; C. 187p) He opined that Schultz's anxiety and depressed mood were understandable given Schultz's current legal problems and that Schultz seemed to have a realistic assessment of his situation. (R. 347, 354; C. 187m) Thus, Dr. Lichtenwald's report defeats any claim that Schultz was exhibiting any psychosis or psychiatric illness after the murder. Notably, the Court of Appeals relied, in part, on Schultz's suspect claims of seeing dots or worms, which Lichtenwald stated were not indicative of psychiatric problems.

Likewise, Dr. Lichtenwald specifically debunked the suggestion that Schultz was suffering from mental illness at the time of Schultz's 1994 hospitalization. He noted that, at the time of the earlier analysis, Schultz's diagnosis was affective disorder, bipolar depressed. (R. 357) However, this diagnosis was based merely on a clinical interview with Schultz. (C. 357) At that time Schultz was unruly and verbally aggressive. (R. 358) It was subsequently discovered that Schultz tested positive for cocaine and cannabis when he was admitted to the hospital in 1994. (R. 358-59) In addition, Schultz was drinking 40 ounces of alcohol per day at that time. (R. 359) As a result it is very possible that Schultz was mis-diagnosed as bipolar in 1994. (R. 358-59) Thus, unlike Ake,

Schultz showed neither a strong present nor a past indication of mental illness.

The Court of Appeals also complained that the state court's opinion ran counter to its own precedent in *People v. Kegley*, 175 Ill.App.3d 335, 529 N.E.2d 1118 (2nd Dist. 1988). (Appendix, p. 13) In fact, the state court majority carefully distinguished *Kegley*. In *Kegley*, the Illinois Appellate Court found that a defendant had been denied his right to the appointment of a mental health expert under *Ake*. *Kegley*, 529 N.E.2d at 1121-1123. In that case, when the defendant was arrested outside of the apartment in which he had allegedly assaulted the victim, he repeatedly demanded that the police shoot him. *Id.* at 1119. When he was taken to jail, Kegley hit his shoulders and head against the cell's walls and bars. *Id.* In addition, Kegley's attorney indicated the possible assertion of the defenses of intoxication (Kegley's urine had tested positive for cocaine and alcohol at the time of arrest) and insanity. *Id.* The motion for the appointment of a psychiatrist included an addendum which stated that Kegley had been hospitalized at the Elgin Mental Health Center pursuant to court order in 1973, that he had been treated several times at the Alcohol Treatment Center in Waukegan, that he had been treated at the Lake County Mental Health Center on two occasions in 1981-84 and that he had been hospitalized at St. Therese Hospital's psychiatric ward several times in 1972-74. *Id.* at 1120. In rejecting Schultz's claim, the appellate court majority here specifically noted, *inter alia*, that Schultz was friendly and cooperative with the police, that Schultz's counsel and the trial court had ample opportunity to observe him, that neither of Schultz's two attorneys had informed the court of any alleged mental incapacities and that Schultz's counsel had made no indication that the defense of insanity would be raised and did not make it an issue during trial. (Appendix, pp. 59-60) In addition,

as set forth above, Schultz did not have the extensive history of psychiatric hospitalization that Kegley did. Indeed, the diagnosis given at Schultz's prior hospitalization was called into question by the expert who examined him for fitness purposes.

The Court of Appeals also indicated that the state court should not have relied on Dr. Lichtenwald's examination because it involved a question of fitness for trial. (Appendix A, p.11) In this regard, the Court of Appeals implied that the state court did not understand the difference between a fitness analysis and an analysis of a defendant's sanity at the time of the crime. (Appendix, p. 11) Of course, a court is presumed to know and apply the law. *Woodford v. Visciotti,* __ U.S. ___, 123 S.Ct. 357, 360 (2002). Moreover, the state appellate court specifically cited to the trial court's recognition of the fact that the issue of whether a psychiatrist should be appointed dealt with Schultz's sanity at the time of the crime. (Appendix, p. 56) In addition, for the Court of Appeals to indicate that Lichtenwald's testimony should not be considered seems contrary to the fact that in *Ake* this Court relied, in part, upon the fact that the defendant was found unfit for trial.

In sum, the Court of Appeals simply chose to discount or emphasize different factors than did the state court and determine that Schultz had met his burden to show that his sanity would be a significant issue at trial. This holding ignores the proper habeas standard as set forth in this Court's precedent. A state-court decision involves an unreasonable application of this Court's precedent if the state court identified the correct governing legal rule from this Court's cases but unreasonably applied that rule to the facts of the particular state prisoner's case. *Williams*, 529 U.S. at 407-08, 411-13. The question for the federal court is whether the state-court decision was objectively unreasonable. *Id.* at 409-10. An unreasonable

application of federal law is not the same as an incorrect or erroneous application. *Id.* at 410-12. Therefore, a federal habeas court may not issue the writ simply because that court concludes, in its independent judgment, that the relevant state-court decision applied clearly established federal law incorrectly or erroneously. *Id.* at 411.

This Court recently stressed the difference, for habeas purposes, between an incorrect opinion and one that is unreasonable. *Visciotti*, 123 S.Ct. 360. In *Visciotti*, the Court of Appeals had found that a state court opinion was unreasonable with regard to a claim of the ineffective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), by disagreeing with the state court's assessment of various factors. *Visciotti*, 123 S.Ct. at 360-61. In reversing, this Court stressed that the federal habeas scheme leaves primary responsibility with the state courts for judgments regarding factors applicable to a particular constitutional analysis and that the Court of Appeals had improperly substituted its own judgment for that of the state court. *Id.* The same error occurred here. While paying lip service to the standard set forth by this Court in *Williams v. Taylor*, the Court of Appeals merely substituted its own judgment, and thereby ignored the distinction between an opinion which may be incorrect and one that is unreasonable.

Thus, the United States Court of Appeals for the Seventh Circuit incorrectly determined both that the state court's opinion was contrary to this Court's precedent where the state court cited and applied the correct precedent and that the state court decision was an unreasonable application of this Court's precedent where there is evidence to support the state court decision but the Court of Appeals chose to assess the evidence differently.

CONCLUSION

For all the foregoing reasons, Petitioner, Thomas F. Page, respectfully requests that this Court grant *certiorari* and reverse the opinion of the United States Court of Appeals for the Seventh Circuit which affirmed the order of the district court granting the writ of habeas corpus.

Respectfully submitted,

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APPENDIX

App. 1

United States Court of Appeals,
Seventh Circuit.

Steven B. **SCHULTZ**, Petitioner-Appellee,
v.
Thomas F. **PAGE**, Warden, Respondent-Appellant.
No. 02-1731.

Argued Nov. 1, 2002.
Decided Dec. 19, 2002.

Before BAUER, POSNER, and EASTERBROOK, Circuit Judges.

BAUER, Circuit Judge.

Petitioner Steven B. Schultz filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 after the Appellate Court of Illinois affirmed his conviction for the November 7, 1995, murder of Betty Taft in Poplar Grove, Illinois. Prior to the trial, counsel for Schultz requested that Schultz be examined for fitness to stand trial as well as for his sanity at the time of the offense. The trial court granted the first request but not the second, and a doctor subsequently found Schultz fit for trial. After his conviction, Schultz appealed the denial of the sanity examination, but the appellate court affirmed the trial court's decision. Schultz then filed a petition for writ of habeas corpus in the Southern District of Illinois, which was granted. The State of Illinois ("State" or "Illinois") now appeals the decision of the district court. Because we find that the Illinois appellate court erroneously applied federal law, we affirm the district court's decision.

BACKGROUND

A. Underlying Facts and Schultz's Murder Trial

Schultz was born in 1976 in Watseka, Illinois. To say that his childhood was a troubled one is an understatement. His mother apparently neglected him, preferring to spend her time in local taverns, and his older sister served as his primary care giver. When **Schultz** was a young boy, a teenage acquaintance sexually abused him. **Schultz** dropped out of high school and studied for, but ultimately failed, the GED exam. In 1994, **Schultz** spent two weeks in a psychiatric hospital and was diagnosed with "affective disorder bipolar, depressed." Other members of his immediate family also have a history of mental illness, depression, and suicide. **Schultz's** father, who **Schultz** claimed also physically abused him as a child, employed him sporadically, but he was otherwise without employment. While he was close to his older sister who cared for him as a child, by November of 1995 **Schultz** lost contact with her. Though things had not gone well for **Schultz** to that point in his life, they certainly did not get better.

On November 7, 1995, **Schultz** killed his girlfriend, Betty Taft, by choking her to death after tying her arms and legs behind her back. The day after the murder, **Schultz** told police that he killed Taft because she insisted that "she wanted to be with her mother." The State charged **Schultz** with first degree murder and scheduled his trial in the Circuit Court of Boone County, Illinois, for May 6, 1996.

On May 1, 1996, **Schultz's** counsel filed a motion to have his client examined for fitness to stand trial. The following day **Schultz's** attorney received supplemental discovery from the State containing a letter written by Joan Lodge, a licensed clinical social worker at the Janet Wattles Center. The letter stated that Lodge had examined **Schultz** on March 14, 1996, after he complained of seeing bugs and worms on the walls while in pre-trial detention and that

Schultz appeared depressed, that he reported sleep disturbance, and that he complained of little motor activity and poor concentration. Lodge noted the history of mental illness, depression, and suicide in **Schultz's** family as well as the fact that **Schultz** had been hospitalized for two weeks in 1994.

During the 1994 hospitalization, after diagnosing **Schultz** with "affective disorder bipolar, depressed" doctors prescribed the drugs Prozac and Depakote. Prozac is an antidepressant and Depakote has recently been used to combat manic episodes, a condition where the patient experiences mood swings from euphoria to depression. Lodge recommended, after her March 14, 1996, evaluation of Schultz, that he again be given those medications. Claiming that this information raised a bona fide doubt about Schultz's sanity at the time of the crime, his attorney filed a separate motion on May 2 to have Schultz evaluated for his sanity at the time of the murder.

On May 2, the trial court addressed the May 1 motion for a fitness examination by appointing Dr. Terrance Lichtenwald, a clinical and forensic psychologist, to examine Schultz for fitness purposes. The trial judge emphasized that his concern in appointing Dr. Lichtenwald was the doctor's ability to administer the exam and report back to the court by ten o'clock the next morning, so as not to delay the trial schedule. Dr. Lichtenwald met with **Schultz** on the afternoon of May 2 for several hours, administering various tests and reviewing reports on **Schultz.**

The following morning, the trial court held a hearing on **Schultz's** fitness to stand trial. Dr. Lichtenwald and two witnesses from the Boone County jail testified as to **Schultz's** current condition and complaints. Specifically, Dr. Lichtenwald opined that **Schultz** was fit to stand trial, and though he acknowledged **Schultz's** previous psychiatric hospitalization and prescription, he questioned the accuracy of **Schultz's** diagnosis. Interestingly, however, Dr.

Lichtenwald stated on cross-examination that **Schultz's** hallucinations "could be part of some brain injury." He also conceded that given more time he would have conducted further testing into **Schultz's** childhood trauma and that eventually a neurological examination of **Schultz** might have been warranted or necessary. Following the hearing, the trial court ruled that **Schultz** was fit to stand trial.

The trial judge did not conduct any further hearing on the sanity issue and asked defense counsel whether notice of the insanity defense had been given according to Illinois law, 725 ILL. COMP. STAT. 5/115-6 and Ill. Sup. Ct. R. 413(d). Schultz's attorney answered that notice had not been given because he had only filed the motion for a sanity examination the previous day, immediately after learning of Lodge's exam and his client's 1994 psychiatric hospitalization. After taking a short recess to consult Illinois case law, the trial judge denied Schultz's motion for a sanity examination.

The court based its ruling on the fact that notice of the insanity defense had not been given and that Dr. Lichtenwald's testimony revealed no reasonable basis from which to believe that an insanity defense could be raised. When Schultz's attorney pressed for clarification on the ruling, the trial judge responded that Dr. Lichtenwald had "already done all the work" during his fitness examination of Schultz.

B. Decisions of the Illinois Appellate Court & United States District Court

Schultz appealed his conviction, including the denial of an examination to determine his sanity at the time of the murder, to the Illinois appellate court. In affirming the trial court's decision not to appoint another psychiatrist, the appellate court found *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), inapplicable.

The appellate court noted properly that *Ake* supports the constitutional right of an indigent defendant, such as Schultz, to have a psychiatrist appointed to conduct a sanity examination when the indigent defendant has shown that his sanity at the time of the offense will be a "significant factor" at trial. *Ake v. Oklahoma,* 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). The appellate court's legal analysis of *Ake* as applied to Schultz's case, however, stated in its entirety:

> We find *Ake* inapplicable to the present case. Here, [Schultz's] sanity was never a factor, much less a significant factor. The State did not order psychiatric care to bolster its case, nor did [Schultz] ever raise the defense of insanity. Further, we acknowledge that [Schultz] did have access to psychiatric care, as he had been previously examined by Lichtenwald and Lodge. Cf. People v. Johnson, 154 Ill.2d 356, 370 (1993).

People v. Schultz, No. 2-96-1318, 298 Ill.App.3d 1174 Unpublished Rule 23 Order, at 30 (Ill.App.Ct., 2nd Dist., Sept. 29, 1998). The appellate court went on to hold that the trial court did not abuse its discretion under Illinois law in denying Schultz a psychiatric exam, in part, because the trial court had ample opportunity to evaluate Schultz and determine his credibility at various pre-trial hearings.

Schultz then filed a petition for writ of habeas corpus in the Southern District of Illinois alleging a denial of due process under *Ake*. A Magistrate Judge initially recommended that the petition be denied; the district court, however, granted Schultz's petition, finding that the trial court's decision not to appoint a psychiatrist was contrary to clearly established federal law as determined by the United States Supreme Court. In particular, the district court rejected the notion that Schultz's sanity at the time of the crime could not be a significant factor at trial.

The district court likened Schultz's case to *People v. Kegley*, 175 Ill.App.3d 335 (1988), in which the Appellate Court of Illinois found more than sufficient evidence to require the appointment of a psychiatrist under *Ake*.

The district court noted that the trial court was aware from Dr. Lichtenwald's testimony that Schultz was hospitalized for bipolar disorder in 1994 and that Schultz stopped taking prescribed medication after his release from the hospital. The district court also noted that the trial court was aware that Schultz was treated for hallucinations while in pre-trial detention and that psychotropic medication was prescribed for him again. Finally, the district court highlighted the trial court's awareness of Schultz's peculiar behavior when arrested, when he confessed to the crime, and when he testified before the trial court at preliminary hearings. Specifically, the district court pointed to the fact that Schultz claimed: a) that the victim told him to choke her; and b) that he believed that if he confessed the State's Attorney would let him "walk free."

The State appeals and relies on three arguments to support reversal of the district court's decision. First, the State argues that the district court examined the incorrect state court decision by looking to the actions of the Illinois trial court because federal law requires the district court to examine the ruling of the last state court to rule on the claim. This was the Illinois appellate court, which rejected Schultz's request with a brief review of *Ake*. Second, the State argues that the Illinois trial court did not issue a ruling contrary to *Ake* because Schultz based his request for a psychiatric exam specifically on the state statute and not under *Ake*. Finally, the State argues that the district court improperly concluded that the trial court's refusal to appoint the psychiatrist was contrary to the rule annunciated in *Ake*.

ANALYSIS

A. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court may grant habeas relief only if the state court's decision on the merits of an issue was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (2002); *Brown v. Sternes,* 304 F.3d 677, 690 (7th Cir.2002).

We review a district court's findings of fact for clear error and its rulings on questions of law *de novo. Ouska v. Cahill-Masching,* 246 F.3d 1036, 1044 (7th Cir.2001). We also apply *de novo* review to determine whether a state court ruling was "contrary to," *id.,* or an "unreasonable application" of clearly established federal law, though "with a grant of deference to any *reasonable* state court decision" on the latter question, *Schaff v. Snyder,* 190 F.3d 513, 522 (7th Cir.1999) (emphasis in original). The state court decision is reasonable if it is "'minimally consistent with the facts and circumstances of the case.'" *Schaff,* 190 F.3d at 523.

B. Proper State Court Decision to Examine

The State asserts correctly that a federal court reviewing a habeas petition should examine the decision of the last state court to rule on the merits of the issue. *Cossel v. Miller,* 229 F.3d 649, 654 (7th Cir.2000). Here, the district court based its ruling on the decision of the Illinois trial court without examining the Illinois appellate court's rejection of Schultz's *Ake* claim. We will, however, examine the appellate court's treatment of Schultz's *Ake*

claim, mindful of the fact that we can affirm on any ground not waived or forfeited in the district court. *Horton v. United States,* 244 F.3d 546, 549 (7th Cir.2000). This determination disposes of the State's first argument that the district court reviewed the wrong state court decision.

We, likewise, dispose easily of the State's second argument that Schultz based his request for a psychiatrist only on a state statute and not under *Ake.* Because the parties argued the merits of Schultz's *Ake* claim in the Illinois appellate court, the merits of his *Ake* claim are properly before this Court. In effect, the State asks us to ignore its first argument (that we should look only to the Illinois appellate court) in order to adopt its second argument. We reject the State's argument that *Ake* was not properly raised by Schultz and address the merits of that claim below.

C. The Merits of Schultz's Ake *Claim*

It bears noting that under Illinois law manic-depression, a bipolar disorder, might serve as a basis for finding a person legally insane. *See People v. Hammerli,* 277 Ill.App.3d 873 (1996) (affirming decision that defendant was guilty but mentally ill due to manic-depression); *see also People v. Black*, 367 Ill. 209, 10 N.E.2d 801, 803 (1937) (discussing testimony of expert witness who diagnosed defendant as "suffering from manic-depressive insanity with alcoholism"); *Hall v. Pittenger,* 365 Ill. 135, 6 N.E.2d 134, 137 (1936) (discussing testimony over whether defendant "had been suffering from a manic depressive form of insanity").

Though there is apparently no case directly holding that "affective disorder bipolar, depressed," from which Schultz suffers, would be sufficient to establish legal insanity, the Illinois courts have discussed Schultz's particular diagnosis as a mental illness, which could possibly lead to a

finding that he was legally insane at the time of the crime. Whether or not he should or could assert an insanity defense, however, cannot be answered without appointing a psychiatrist. We must determine, therefore, whether the decision of the Illinois appellate court was "contrary to" or an "unreasonable application of" clearly established federal law.

A state court decision is "contrary to" Supreme Court precedent if: a) it arrives at a conclusion opposite to that reached by the Supreme Court on a question of law; or b) the state court reaches a result opposite to the Supreme Court on facts that are materially indistinguishable from relevant Supreme Court precedent. *Ouska,* 246 F.3d at 1044. We will address only the first prong under the "contrary to" test.

As we noted above, the Supreme Court held as a matter of law in *Ake v. Oklahoma* that an indigent defendant is entitled to have a psychiatrist appointed to assist in his defense if the defendant shows that his sanity at the time of the crime will be a significant factor at trial. *Ake v. Oklahoma,* 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). The Illinois appellate court held that Schultz's sanity "was never a factor, much less a significant factor" because: 1) the State did not order psychiatric care to bolster its case; 2) Schultz did not formally raise the insanity defense; and 3) Schultz had access to psychiatric care by Lodge and Dr. Lichtenwald.

First, the State's decision to order a psychiatric examination of a defendant has little to do with an indigent defendant's right under *Ake* to have a mental health expert assist in the preparation of his defense. A state-initiated, psychiatric examination of a defendant merely demonstrates that in such a situation the defendant is clearly entitled to his own expert and examination to help prepare his defense because the state has signaled that it may use psychological evidence against the de-

fendant. The absence of such an examination by the State, however, cannot be used by a court to determine that an indigent defendant is not entitled to an examination when the defendant initiates the request for one. The State's belief that such absence is in some way relevant is unfounded. The appellate court's reliance on the fact that prosecutors did not initiate a psychiatric exam of Schultz, therefore, is misplaced.

Next, the appellate court stated that Schultz never formally raised the insanity defense. The court, presumably, is referring to the statutory procedures under Illinois law for asserting the insanity defense as they existed at the time of Schultz's trial. *See* 720 ILL. COMP. STAT. 5/6-2 (1996), *amended by* P.A. 89-404, § 15, eff. Aug. 20, 1995 (declared unconstitutional by *People v. Ramsey,* 192 Ill.2d 154 (2000)); 725 ILL. COMP. STAT. 5/115-6 (1996); Ill. Sup. Ct. R. 413(d). Because Schultz's trial counsel learned of his client's 1994 hospitalization and Lodge's March 1996 examination only days before the trial was scheduled to begin, and because counsel immediately requested both fitness and sanity examinations, we find it difficult to understand how he could have formally asserted an insanity defense before the appointment of a psychiatrist. We need not, however, delve further into Illinois law on this procedure; we find that Schultz's request for a psychiatric examination sufficiently alerted the State and the trial court to the possibility that he might plead insanity.

Third, the appellate court based its rejection of Schultz's *Ake* claim by miscasting the nature of Lodge's and Dr. Lichtenwald's examinations. Lodge is a licensed clinical social worker, not a medical or psychiatric doctor, who examined Schultz on March 14, 1996, after he complained of hallucinations in pre-trial detention. While the State did not explain why it did not forward notice of this exam to Schultz's attorney until short days before

trial, Lodge's examination did nothing to evaluate Schultz's sanity at the time of the crime.

Similarly, though he is a psychiatric doctor, Dr. Lichtenwald examined Schultz only for fitness to stand trial. While portions of that examination might be relevant or repeated during an examination as to his sanity at the time of the murder, it is difficult to understand why the Illinois appellate court considered a fitness examination sufficient for purposes of determining Schultz's sanity *at the time of the crime.* Such a determination runs counter to Illinois precedent clearly recognizing the inherent difference between the two examinations. *People v. Adamcyk,* 259 Ill.App.3d 670 (1996). While the State concedes as much, it argues that Schultz's access to some psychiatric care can be relevant to our determination. We are unpersuaded by this argument.

Furthermore, Dr. Lichtenwald's concessions regarding the additional testing he would have performed on Schultz as well as his testimony on the possible origin of Schultz's hallucinations as "part of some brain injury" support our conclusion that the examinations conducted by Lodge and Dr. Lichtenwald did not constitute sufficient psychiatric evaluation for determining whether Schultz was sane at the time of the crime.

Beyond rejecting the appellate court's assertions, there is ample evidence to suggest that Schultz's sanity at the time of the crime would be a significant factor at trial. *Ake,* 470 U.S. at 83, 105 S.Ct. 1087. To begin with, Schultz was hospitalized for two weeks in a psychiatric institution in 1994, during which time doctors diagnosed him with "affective disorder bipolar, depressed" and prescribed the psychotropic drugs Prozac and Depakote. It is also unclear whether Schultz was still on this medication when he killed Taft. His family history of depression, suicide, and mental illness has been documented by mental health professionals. His parents abused or neglected

him and an older, teenage boy sexually abused him as a child.

When Schultz was arrested, he claimed that the victim wanted him to choke her to death so that she could "be with her mother." He also testified that he thought the State's Attorney would let him "walk free" if he confessed to the crime. As the dissent characterized it, Schultz's "admission to the crime [was] saturated with psychological overtones." *People v. Schultz,* No. 2-96-1318, 298 Ill.App.3d 1174, Unpublished Rule 23 Order, at 39 (Ill.App.Ct., 2nd Dist., Sept. 29, 1998) (Bowman, J., dissenting). Finally, during pre-trial detention Schultz complained of seeing bugs and worms on the wall. Schultz's behavior was erratic enough that the Boone County jail brought in Lodge to examine him. She concurred with Schultz's bipolar diagnosis and advised that he restart the medication originally prescribed during the 1994 hospitalization.

A state court decision is based on an "unreasonable application" of clearly established federal law if the state court identifies the correct legal principle but applies it unreasonably to the facts at hand. *Ouska,* 246 F.3d at 1044. The Illinois appellate court identified *Ake* in its decision, though it held that *Ake* was inapplicable after determining that Schultz's sanity "was never a factor, much less a significant factor." We turn now to whether the appellate court unreasonably applied *Ake,* keeping in mind the appropriate deference we are to show the state court decision. *Schaff,* 190 F.3d at 522.

We find that the appellate court's treatment of *Ake* was not minimally consistent with the facts and circumstances of Schultz's case. *Schaff,* 190 F.3d at 523. We dismissed above each of the grounds upon which the appellate court determined that *Ake* did not apply and found that enough evidence existed to show that Schultz's

sanity at the time of the crime would be a significant factor in his trial.

The appellate court's decision also runs counter to its own precedent. As the dissent in the appellate court pointed out, the Appellate Court of Illinois in *People v. Kegley* held that the defendant was entitled to a psychiatric examination under *Ake*. *People v. Kegley,* 175 Ill.App.3d 335 (1988). The court first held that Kegley's request for an examination was timely, even though it was made two days before trial. *Id.* at 1122. Schultz's attorney filed his motion for the appointment of a psychiatrist more than two days before trial and did so immediately upon learning of evidence that brought Schultz's sanity into question. Thus, Schultz's request was timely as well.

Similarly, the *Kegley* court found that enough evidence existed showing that Kegley's sanity at the time of the crime would be a significant factor at trial. *Id.* at 1122. In particular, the court pointed to Kegley's irrational behavior when he was arrested, including asking the police to shoot him and hitting his head and shoulders against the bars and walls of his cell. *Id.* at 1119. Kegley's public defender commented that he "had become 'an intense religionist to such exaggerated extent that the fervor borders on the irrational.'" *Id.* The court also noted his numerous hospitalizations for mental health and substance abuse problems, including testing positive for drugs and alcohol when arrested, and his expression of suicidal desires to his attorney during trial. *Id.* at 1120.

Schultz's behavior during police interrogation was equally abnormal, in that he claimed Taft wanted him to choke her to death so that she "could be with her mother" and that he believed his confession meant the State's Attorney would let him "walk free." **Schultz** was also hospitalized for mental health reasons, but apparently unlike Kegley, **Schultz** was medicated for his problems. Also

unlike Kegley, **Schultz** complained of hallucinations during pre-trial detention, has a family history of depression and suicide, and was abused and neglected as a child. Accordingly, we conclude that the facts of **Schultz's** case resonate enough with those in *Kegley* that even Illinois' precedent demonstrates the need for appointing a psychiatrist to examine **Schultz's** sanity at the time of the crime.

CONCLUSION

We hold that the Illinois appellate court's rejection of **Schultz's** *Ake* claim was both contrary to and an unreasonable application of clearly established United States Supreme Court precedent requiring the appointment of a psychiatrist; **Schultz** showed that his sanity at the time of the crime would be a significant factor at trial. Accordingly, we AFFIRM the decision of the district court to grant the writ of habeas corpus.

313 F.3d 1010

[Dated February 20, 2002]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

STEVEN B. SCHULTZ,	)	
	)	
Plaintiff,	)	
vs.	)	**Case No. 99-cv-0491-MJR**
	)	
	)	
THOMAS F. PAGE,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

REAGAN, District Judge:

I. Introduction

On July 12, 1999, Steven Schultz filed a Petition for Writ of Habeas Corpus (Doc. 7) pursuant to **28 U.S.C. §2254** alleging that his State of Illinois conviction for first-degree murder is unlawful under the United States Constitution because the trial judge denied his motion to have an expert appointed and paid for by the court to examine him and determine his sanity at the time of the offense. On September 21, 2000,[1] Magistrate Judge Gerald B. Cohn submitted a Report and Recommendation ("the Report") pursuant to **28 U.S.C. §636(b)(1)(B)**, which found that Schultz was not denied his Constitutional right to due process of law by the trial court's refusal to appoint a psychiatrist for further evaluation and recommends that

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[1] Due to an administrative error in the transferring of this case the undersigned judge, the Report and Recommendation failed to appear on the undersigned judge's pending motion list and was only recently brought to the undersigned judge's attention.

Schultz' Petition for Writ of Habeas Corpus be denied (Doc. 22). On October 10, 2000, Schultz filed objections to the Report (Doc. 23).

II. Standard of Review

Timely objections having been filed, the Court must undertake *de novo* review of the Report. **28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b); Govas v. Chalmers, 965 F.2d 298, 301 (7th Cir. 1992).** The Court may accept, reject, or modify the recommended decision, giving fresh consideration to "only . . . those portions of the magistrate judge's disposition to which specific written objection is made." **Johnson v. Zema Systems Corp., 170 F.3d 734, 739 (7th Cir. 1999).**

The Antiterrorism and Effective Death Penalty Act of 1996, ("AEDPA"), **28 U.S.C. § 2254**, "provides that habeas relief may be granted if a state court's adjudication of a matter 'resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States.'" **Dixon v. Snyder, 266 F.3d 693, 699-700 (7th Cir. 2001), citing 28 U.S.C. § 2254(d)(1).** "A state court decision is contrary to Supreme Court precedent if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law." **Id.**

III. Relevant Underlying Facts

On November 14, 1995, Schultz was charged by information in the Circuit Court of Boone County, Illinois with two counts of first degree murder. Due to Schultz' peculiar behavior and treatment for delusional thoughts while being held pre-trial, as well as his history of mental illness, his attorney filed a motion on May 2, 1996 for the trial court to appoint a "clinical psychologist for the purpose

of reporting to [the] [c]ourt his opinion as to whether Schultz was sane at the time of the alleged offense . . . [and] whether Schultz was fit to stand trial."

Because Schultz trial was scheduled to begin on May 6, 1996, the trial court expeditiously held a hearing on Schultz' motion on the same day it was filed. At the conclusion of the hearing, the trial court appointed Dr. Terrance G. Lichtenwald to examine Schultz, determine if he was fit to stand trial only, and report back to the court the following day. Curiously, the court did not order Dr. Lichtenwald to opine regarding the sanity of Schultz at the time of the offense.

The next day May 3, 1996, the Court held a hearing to determine Schultz' fitness to stand trial. The Court heard testimony from:

-John Hare - the jail supervisor for Boone County who had Schultz evaluated by Joan Lodge, a Licensed Certified Social Worker ("LCSW"), after Schultz exhibited delusional behavior while being held pretrial;

-Dr. Kent J. Hess - the physician Lodge asked to prescribe Schultz Depakote®[2] and Prozac®[3] which he had

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[2] A brand name of valproate, and anticonvulsant medication which can have mood-stabilizing effects and is indicated for the treatment of manic episodes associated with bipolar disorder. **Melissa Spearing, Bipolar Disorder, National Institute of Mental Health, No. 01-3679; Physicians' Desk Reference, 2001 Edition.**

[3] A brand name of Fluoxetine, an antidepressant medication which can have mood-stabilizing effects and is indicated for the treatment of depression. **Melissa Spearing, Bipolar Disorder, National Institute of Mental Health, No. 01-3679; Physicians' Desk Reference, 2001 Edition.**

taken in the past for bipolar disorder[4] and depression, in order to treat the delusional behavior and depression he was exhibiting at the jail while being held pretrial; and

-Dr. Lichtenwald - who conducted a five-hour examination the day before and reported his findings and opinions regarding Schultz fitness to stand trial.[5]

Based upon this evidence, the trial court found that Schultz was fit to stand trial. Defense counsel pointed out that Schultz sanity at the time of the offense was still at issue and an examination regarding his sanity at the time of the offense had also been requested in his motion. In evaluating this issue the trial court found that Schultz had not previously disclosed that any of the insanity defenses may be used at trial. Therefore, the trial court sought to determine whether the facts and circum-

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[4] "Bipolar disorder, also known as manic-depressive illness, is a brain disorder that causes unusual shifts in a person's mood, energy, and ability to function. . . . Like diabetes or heart disease, bipolar disorder is a long-term illness that must be carefully managed throughout a person's life. 'Manic-depression distorts moods and thoughts, incites dreadful behaviors, destroys the basis of rational thought, and too often erodes the desire and will to live. It is an illness that is biological in its origins, yet one that feels psychological in the experience of it: an illness that is unique in conferring advantage and pleasure, yet one that brings in its wake almost unendurable suffering and not infrequently suicide' . . . Sometimes severe episodes of mania or depression include symptoms of psychosis (or psychotic symptoms) [such as] hallucinations . . . And delusions. **Melissa Spearing, Bipolar Disorder, National Institute of Mental Health, No. 01-3679, quoting Kay Redfield Jamison, Ph.D., An Unquiet Mind, 1995, p.6.**

[5] Due to the limited time frame, Dr. Liehtenwald orally reported his findings to the Court the day after the examination. However, his written report was not filed until May 16, 1996, two days after the trial had concluded.

stances of the case justified a reasonable belief that such a defense could be raised. In doing so, the trial court considered that Schultz had already been examined by Dr. Lichtenwald, who he found was available to both parties and "had already done all the work." The trial court also found that the facts and circumstances of the case did not justify a reasonable belief that such a defense could be raised. Accordingly, the trial court found that there was no need to have Schultz examined by another psychologist or psychiatrist to determine his sanity at the time of the offense and, therefore, denied that prong of Schultz' motion.

Accordingly, the case proceeded to trial as scheduled on May 6, 1996. The jury returned a verdict finding Schultz guilty of first degree murder on May 14, 1996.

IV. Schultz' Objections

Schultz makes eight objections to Magistrate Judge Cohn's Report and Recommendation. In his first objection, Schultz contends that contrary to Judge Cohn's finding in the Report that he argued for the appointment of Dr. Lichtenwald, he did not. Schultz argues that he merely chose Dr. Lichtenwald because he was not familiar with other proposed physician, Dr. Gordon.

The Court agrees that the totality of Schultz' "argument" on the subject of Dr. Lichtenwald at the May 2, 1996 hearing was a brief comment regarding his preference for Dr. Lichtenwald over the other physician with whom he was not familiar. However, the Court also recognizes that the May 2, 1996 hearing was set to argue Schultz' motion to appoint a clinical psychologist and Schultz' opinion was that Dr. Lichtenwald should examine him. Regardless, the Court finds this issue to be immaterial and irrelevant to the ultimate finds, conclu-

sions, and recommendations made by Judge Cohn. Therefore, Schultz' first objection is rejected.

Under the heading of his second objection, Schultz makes several arguments. First, he argues that Judge Cohn has concluded incorrectly that Dr. Lichtenwald found that Schultz was not suffering from bipolar disorder. The Court disagrees. The Report merely states that Dr. Lichtenwald provided an alternative explanation for Schultz' prior diagnosis of bipolarity (i.e., that he used cocaine and cannabis and consumed 40 ounces of alcohol per day), not that Judge Cohn concluded that Schultz failed to suffer from bipolar disorder.

Next, Schultz argues that Judge Cohn, as well as the trial judge, "fundamentally misunderstand a court's role in examining the circumstantial evidence of insanity as one in which the court should find there is no threshold showing that insanity will be a factor in the case unless the facts and circumstances exclude every reasonable hypothesis of insanity." Schultz also asserts that the case Judge Cohn cited for his premise "adopted no such analysis." The Court disagrees. As Judge Cohn cited, the United States Supreme Court clearly held that "[w]hen the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent." **Ake v. Oklahoma, 470 U.S. 68, 82-83 (1985).**

Ake also dismisses Schultz' next contention - that it was error to require him to establish his insanity at the time of the offense beyond a reasonable doubt in order to obtain an expert to examine him. As quoted above, Judge Cohn found that Schultz was merely required to show that his sanity was likely to be a significant factor in his defense, not that he was insane beyond a reasonable doubt. **Id. at 82-83**. Since Judge Cohn cited **Ake** correctly and neither Judge Cohn nor the trial court

ever stated or held that Schultz must establish his insanity at the time of the offense beyond a reasonable doubt before an expert would be appointed, the Court finds no error. Accordingly, Schultz' second objection is rejected in its entirety.

In his third objection, Schultz argues that Judge Cohn was incorrect in concluding that a court-appointed psychiatrist was unnecessary under **Ake** unless the State raised the issue of the defendant's sanity. Schultz contends that access to psychiatric assistance for indigents is not contingent upon State action or inaction. The Court's review of the Report reveals that Judge Cohn merely pointed out that when the State makes a defendant's sanity an issue at trial, it is rather obvious that the defendant must have the assistance of a psychiatrist. However, this premise does not undermine the United States Supreme Court's holding in **Ake** which Judge Cohn had cited previously - that when the defendant shows that his sanity at the time of the offense will be a significant factor at trial, he is entitled to the assistance of an expert psychiatrist. Accordingly, the Court rejects Schultz' third objection.

The Court addresses Schultz' remaining five objections together. In total, Schultz argues that although the trial court stated that Dr. Lichtenwald was available to both sides at trial and "had done all the work," he was entitled to the appointment of another expert on the issue of his sanity at the time of the offense because Dr. Lichtenwald's examination was limited solely to the issue of his fitness to stand trial. He also argues that Judge Cohn incorrectly found that he did not properly raise the issue of his sanity at the time of the offense, or that he made only "undeveloped assertions" regarding his need for the appointment of a psychiatrist on the issue of his sanity at the time of the offense. The Court agrees.

First, this Court's review of the record below reveals that the trial court's order directing Dr. Lichtenwald to conduct the pretrial evaluation was limited only to Schultz' fitness to stand trial and said nothing regarding Schultz sanity at the time of the offense. This limitation was clarified by Dr. Lichtenwald's testimony wherein he stated he was hired to determine Schultz' fitness to stand trial only as well as Dr. Lichtenwald's written report which is entitled "Fitness to Stand Trial Evaluation." Therefore, the trial court was incorrect in stating that Dr. Lichtenwald "had done all the work." It is clear that Dr. Lichtenwald had not conducted an evaluation regarding Schultz' sanity at the time of the offense. Accordingly, it mattered not that he was available to both sides at trial, since he had no information regarding the topic.

Second, the Court finds that the trial court failed to apply the **Ake** standard when considering Schultz' motion for appointment of an expert to determine his sanity at the time of the offense. In **Ake**, an indigent defendant charged with first degree murder was found by a psychiatrist to be unfit to stand trial after he had acted in a bizarre manner at his arraignment. **Id. at 68**. After being committed to a state mental hospital for six weeks, however, Ake was found to be competent on the condition that he continue using his prescribed antipsychotic drug. **Id.** The State then resumed proceedings and at a pretrial conference, Ake's attorney informed the Court that an insanity defense would be used at trial and argued that Ake had a Constitutional right to be examined by a psychiatrist at the state's expense to determine his mental state at the time of the offense. **Id.** The trial court denied Ake's request. **Id.** At the ensuing trial, the examining psychiatrists testified that Ake was dangerous to society, but there was no testimony regarding his sanity at the time of the offense since no examination in this regard had been conducted. **Id.** Accordingly, the jury heard

no testimony regarding Ake's sanity at the time of the offense and ultimately found his guilty on all counts. **Id.**

On appeal, the United States Supreme Court reversed the trial court's denial of Ake's motion for an examination of his sanity at the time of the offense and held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution **requires** that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot afford one." **Id. at 74 (emphasis added).** In explaining its decision the **Ake** Court reasoned that:

> when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of poverty a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

Id. at 76. The Court further described this right as a "basis tool of an adequate defense" which must be provided to indigent defendants in order to provide "meaningful access to justice." **Id. at 77.** "[W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high." **Id. at 82.**

The Court's review of the transcript and record before it reveals that the trial court did not apply the **Ake** standard. Instead, the trial court undertook an analysis of

whether the facts and circumstances of the case justified a reasonable belief that an insanity defense could be raised. By not applying the standard set out by the United States Supreme Court in **Ake** when considering Schultz' motion, the trial court clearly erred.

Furthermore, the Court also rejects the notion that Schultz' sanity at the time of the offense could not have been a significant factor at trial. The Court finds this case analogous to **People v. Kegley, 529 N.E.2d 1118 (Ill. App. 1988).** In **Kegley**, the trial court denied Kegley's motion for a psychiatric examination to determine his sanity at the time of the offense even though the evidence before the trial court at the time of the motion showed that Kegley had acted peculiar during his arrest and lockup, tested positive for the use of narcotics, acted peculiar during attorney-client interviews, and had been hospitalized at various mental health and substance abuse facilities before the offense. In reversing and remanding the case back to the trial court, the **Kegley** court found there was more than sufficient evidence before the trial court of Kegley's psychological problems and substance abuse to meet **Ake's** requirement of a preliminary showing that Kegley's sanity at the time of the offense would be a significant factor at trial. **Id. at 1122.**

Similarly, this Court finds that the trial court in the case at bar had more than sufficient evidence before it at the time the motion was heard which made a preliminary showing that Schultz' sanity would be a significant factor at trial. First, the trial court was aware from Dr. Lichtenwald's testimony that Schultz was hospitalized for bipolar disorder one year before the murder and had stopped taking his psychotropic medication[6] sometime

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[6] "Psychotropic medication is 'medication whose use for antipsychotic, antidepressant, antimonic, antianziety, behavioral

(continued...)

after he was released leaving a question of whether he was medicated or not at the time of the offense. The trial court was also aware that Schultz had been treated for hallucinations while awaiting trial in county jail and that psychotropic medication had been prescribed. Last, the trial court was aware from preliminary hearing that Schultz acted very peculiar when he was arrested, when he tendered his confession, and when he testified before the trial court - stating that the victim encouraged him to choke her and that if he confessed, the State's Attorney would let him "walk free." In light of this evidence, the trial court had more than sufficient evidence that showed that Schultz' mental condition and sanity at the time of the offense would be a significant factor and substantial issue at trial. Therefore, the trial court denied Schultz' Constitutional right to due process of law by its refusal to appoint a psychiatrist to examine his sanity at the time of the offense.

V. Conclusion

For the foregoing reasons, the Court finds that the trial court's refusal to appoint a psychiatrist to examine Schultz' sanity at the time of the offense resulted in a decision that was contrary to clearly established Federal law, as determined by the Supreme Court of the United States and also a denial of Schultz' Constitutional right to due process of law. Accordingly, the Court

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[6] (...continued)
modification or behavioral management purposes is listed in AMA Drug Evaluations, lates edition, or Physician's Desk Reference, latest edition, or which are administered for any of these purposes.'" **People v. Mayoral, 702 N.E.2d 238, 247 (Ill.App. 1998), citing § 1-121.1 of the Illinois Mental Health and Developmental Disabilities Code, 405 ILCS 5/1-121.1.**

REJECTS the Report and Recommendation (Doc. 22), **GRANTS** Schultz' Petition for Writ of Habeas Corpus (Doc. 1), and **REMANDS** the case back to the Circuit Court of Boone County for further proceedings consistent with this opinion. Specifically, the trial court shall appoint a psychiatrist to examine Schultz regarding his sanity at the time of the offense.

IT IS SO ORDERED.

DATED this 20th day of February, 2002.

MICHAEL J. REAGAN
United States District Judge

[Dated September 21, 2000]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, ex rel. STEVEN B. SCHULTZ,	)	
Petitioner,	)	
vs.	)	Case No. 99-491-DRH
THOMAS F. PAGE,	)	
Respondent.	)	

REPORT and RECOMMENDATION

This Report and Recommendation is respectfully submitted to Judge David R. Herndon pursuant to 28 U.S.C. 636(b)(1)(B).

Petitioner, an inmate at Menard Correctional Center, filed a habeas corpus Petition pursuant to 28 U.S.C. §2254 on July 12, 1999.

Before the Court is respondent's Answer filed with supporting memorandum on September 22, 1999. A hearing was held on March 10, 2000. This Court examined the parties' pleadings, memoranda and supplemental authority. For the reasons stated below, the Court makes the following Report and Recommendation.

i. Background

In the Circuit Court of Boone County, petitioner was convicted of first-degree murder and was sentenced to a term of natural-life imprisonment.

Petitioner first appealed his conviction to the Illinois Appellate Court which affirmed the trial court's judgment. *People v. Schultz*, No. 2-96-1319 (2nd Dist. 1998). Petitioner then sought leave to appeal to the Illinois Supreme Court which was denied. *People v. Schultz*, No. 86512 (1999). Petitioner then filed the instant Petition for Writ of Habeas Corpus.

Petitioner's sole allegation in the instant Petition for Writ of Habeas Corpus is that his conviction is unlawful under the United States Constitution because the trial judge denied his motion to have an expert appointed and paid for by the court to examine him to determine his sanity at the time of the offense.

II. Discussion

A. Relevant Facts

The facts relevant to this case are as follows: On November 14, 1995, petitioner was charged by an information in the Circuit Court of Boone County, Illinois with two counts of first-degree murder. (R. C. 13). While being held in the Boone County Jail, petitioner complained that he was seeing bugs and worms, and asked for medical treatment. (R. C. 093). A licensed clinical social worker, Joan Lodge, evaluated petitioner and noted that he had a previous inpatient psychiatric admission. *Id.* Lodge also recommended that the medications prescribed after his earlier admission be restarted. *Id.* A copy of Lodge's evaluation and recommendation letter was served on petitioner's attorney as a Supplemental Answer to Defendant's Motion for Discovery. (R.C. 092). Petitioner's attorney immediately moved the court to appoint a "clinical psychologist for the purpose of reporting to [the] [c]ourt his opinion as to whether [petitioner was sane at the time of the alleged offense . . . [and] whether the [petitioner was] fit to stand trial." (R. C. 090).

The trial court held a hearing on the motion to appoint a clinical psychologist on May 2, 1996. R. 299. During the hearing petitioner's attorney argued for the appointment of Dr. Lichtenwald. *Id.* The trial court pointed out that Dr. Lichtenwald was not an M.D., but a clinical psychologist, and that the issue of fitness was a "medical problem." (R. C. 300). Petitioner's attorney stated that his concern was "that prong of the fitness issue which says the defendant's ability to meaningfully take part in the trial and help his attorney prepare in his defense. That's essentially the legal parameters I'm coming from." (R. C. 301). The judge later queried the parties as to the availability of another expert, a Dr. Gordon, a medical doctor. (R. 303). The court indicated his confidence in Dr. Gordon and the quality of his work. *Id.* The trial court recognized that the parties felt Lichtenwald would be a better choice, and ordered him appointed if available, with Dr. Gordon as the second choice. (R. 304).

Dr. Lichtenwald evaluated petitioner and reported his findings in testimony to the trial court on May 3, 1996, followed by a written report filed May 16, 1996. His testimony at the hearing included an explanation of the basis for petitioner's earlier diagnosis of affective disorder bipolar depressed. The diagnosis was based only on petitioner's clinical presentation, "how he came across in the interview." (R. 357). Lichtenwald testified that petitioner's clinical presentation was likely due to the use of cocaine, cannabis and the consumption of 40 ounces of alcohol per day. R. 358-60. Finally, Lichtenwald testified that while petitioner did not complain of seeing bugs and worms, petitioner did complain of seeing dots. R. 360. Further testimony elicited by both parties and questioning by the court, established that the dots were most likely due to a mechanical problem with petitioner's eyes such as partially detached retina, rather than psychological dysfunction. (R. 360-71).

After the testimony, petitioner's attorney raised before the court his concern that petitioner's hallucinations might "impact on his ability to cooperate with [counsel] . . . if he happens to go into one of those [hallucinatory] stages at the critical moment." R. 373. Petitioner's attorney then raised the issue of appointment of an expert based on a reasonable belief that the defenses of sanity and mental illness could be raised. R. 381. Petitioner's trial counsel did not provide the trial court a direct explanation of how sanity would be an issue at trial. *Id.* After adjourning to examine the relevant statutes and case law, the court specifically found that based on a "review of the facts in evidence here and the definition of insanity set forth in the statute, in the opinion of the [c]ourt there is no reason for . . . appointing further psychologists [or] psychiatrists . . . to examine [petitioner]." R. 384.

B. Legal Standard

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") governs this case because petitioner's Petition for Writ of Habeas Corpus was filed after the date of the AEDPA's enactment. The act prescribes a deferential standard of review for habeas corpus petitions. In reviewing petitioner's claim, this Court must review closely the judgment of the state court, and uphold it unless it is firmly convinced that a federal Constitutional right has been violated. *Williams v. Taylor*, ___ U.S. ___, 120 S.Ct. 1495 (2000). A federal court is not permitted to substitute its own independent judgment as to the correct outcome. *Washington v. Smith*, 219 F.3d 620, 628 (7th Cir. 2000). The writ may not issue unless the state-court decision was "both incorrect and unreasonable." *Id.*

A defendant who demonstrates that his sanity at the time of the alleged offense will be a significant factor at trial must have access to expert psychiatric assistance. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). The purpose of this rule is to balance the almost uniquely compelling

private interest in a fair trial with the relatively insubstantial economic interest of the state in providing an expert. *Id.* at 82. An indigent defendant cannot present an insanity defense without an expert to assist in its preparation. *Id.* Due process, thus, requires the appointment of an expert to safeguard the defendant's right to a fair trial. Where a defendant's mental condition is not at issue, psychiatric assistance is not required. *Id.* Thus, when an indigent defendant demonstrates to the court that his sanity at the time of the alleged offense is an issue at trial, he must be provided the services of a psychiatric expert at no cost.

Both parties recognize that the key issue in the case at bar is whether it was reasonable for the trial court, based on the record in this case, to deny petitioner's motion to appoint a psychiatrist to assist the defense. A proper decision under AEDPA and *Ake* requires that this Court determine whether the trial court's decision to deny petitioner the services of a psychiatric expert was reasonable.

C. In the opinion of this Court, petitioner was not denied his Constitutional right to due process of law by the trial court's refusal to appoint a psychiatrist for further evaluation.

Petitioner has failed to demonstrate that his mental state at the time of the offense was a substantial factor in his defense or even a collateral issue at trial. *Ake* requires a preliminary showing to demonstrate to the court that his sanity at the time of the alleged offense would be an issue at trial. In *Ake*, the Supreme Court noted that the assistance of a psychiatrist is often crucial "when the *State* has made the defendant's mental condition relevant." *Ake*, 470 U.S. at 80 (emphasis added). In the instant case, neither petitioner's trial counsel nor the state indicated that the issue of sanity would be a factor at trial. The record clearly indicates that petitioner's trial counsel argued for the appointment of a second expert to exa-

mine petitioner because of a concern about his client's ability to cooperate with him.[1] This is an issue of fitness and was resolved reasonably to the trial court's satisfaction by the examination conducted by Dr. Lichtenwald. Petitioner's trial counsel also failed to specifically argue how the issue of sanity could be introduced under the facts of the case. The trial court addressed each of these issues independently under the two separate motions introduced by petitioner's trial counsel. Petitioner's trial counsel declined the trial court's invitation to give any "reasonable facts and circumstances of the case to justify a reason to believe" that sanity would be an issue at trial. R. 381-84.

The defense of insanity can only be raised under 720 ILCS 5/6-2 which reads in pertinent part, "A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity to appreciate the criminality of his conduct." 730 ILCS 5/6-2 (West 1996). Petitioner correctly notes that the statute expressly addresses mental state at the time of the alleged offense. Petitioner argues that the trial court's decision was based on a fitness examination, which was designed to determine the petitioner's mental state at the *time of trial* and was thus decided under the wrong standard. *Ake* only requires that the court determine whether or not sanity would be an issue at trial. Petitioner's argument must fail because the trial court used the testimony of the expert witness, the facts and circumstances of the case, and petitioner's failure to explain how sanity would be raised at trial to decide whether to appoint a psychi-

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[1] Petitioner's trial counsel refers to this issue as "fitness as far as sanity." The trial court then differentiated sanity and fitness under the relevant statutes, requesting directly from petitioner's trial counsel an explanation of how sanity could be raised at trial. (R. 373).

atric expert to the defense. This decision was expressly predicated on the finding that threshold conditions for a defense of insanity were not found. "A criminal defendant must offer 'more than undeveloped assertions that the requested assistance would be beneficial.'" *Ross v. Ward*, 165 F.3d 793, 798 (10th Cir. 1999) (citing *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985)). Without some showing that petitioner's sanity would be an issue at trial, the State has no duty to provide an expert witness. Because the State had no duty to provide petitioner an expert witness did not infringe on petitioner's Constitutional due process rights. Therefore, petitioner's sole claim of denial of due process is meritless.

III. Conclusion

In the opinion of this Court, the trial court reasonably determined that petitioner's sanity at the time of his offense would not be at issue at his trial. Because sanity was not an issue at trial, no right of due process was implicated in the decision not to provide petitioner with a psychiatric expert. The record shows that the trial court carefully analyzed the statutes and case law relevant to the issues to be tried, as well as the expert witness testimony of Dr. Lichtenwald, in deciding whether an adequate showing was made. This Court, therefore, believes that it was both correct and reasonable for the trial court to deny the appointment of a psychiatric expert for petitioner's defense.

Accordingly, for the above stated reasons, it is the recommendation of this Court that petitioner's Petition for Writ of Habeas Corpus be denied.

Dated this 21st day of September, 2000.

GERALD B. COHN
UNITED STATES MAGISTRATE JUDGE

App. 34

[Dated September 29, 1998]

No. 2–96–1318

IN THE

SECOND DISTRICT APPELLATE COURT

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit) Court of Boone County
Plaintiff-Appellee,	) No. 95–CF–120.
v.	)
STEVEN B. SCHULTZ,	) Honorable) Alford R. Penniman,
Defendant-Appellant.	) Judge Presiding.

RULE 23 ORDER

Defendant, Steven B. Schultz, was charged by information with two counts of first-degree murder (see 720 ILCS 5/9-1(a)(1)(a)(2) (West 1994)). The cause proceeded to trial where a jury found defendant guilty. The trial court entered its judgment of conviction and imposed an extended sentence of natural life imprisonment (see 730 ILCS 5/5-8-1(a)(1)(b) (West 1996)). The trial court denied defendant's post-trial motion, and defendant timely appeals.

On appeal, defendant raises several arguments, including whether: (1) defendant's confession was voluntary;

(2) defendant was fit to stand trial; (3) the trial court should have appointed a physician to examine defendant on the issue of his sanity at the time of the offense; and (4) the natural-life sentence for first-degree murder should be reduced.

The record reflects that, on November 9, 1995, a criminal complaint was filed against defendant, charging him with two counts of first-degree murder. Also filed on November 9 was defendant's statement of events, including his admission that he killed Betty Taft. In his statement, defendant recounted that he and the victim were at her residence when the victim began kissing and fondling defendant and attempting to undress him. Defendant went to the bedroom, whereupon the victim entered her bedroom naked carrying a knife. The victim threatened defendant with the knife and told him to undress. Defendant complied, then took a wire or cord from the victim and placed it around the victim's throat and began choking her. Defendant let go, but stated that the victim "insisted that he keep on doing this to her because she wanted to be with her mother." He choked the victim until she could not breathe any longer, and the knife fell out of her hand. Defendant covered the victim with a blanket, dressed himself, shut the bedroom door, and put the knife back into the kitchen. Defendant next wrote checks out to himself from the victim's checkbook and unsuccessfully attempted to cash them. Thereafter, defendant, a friend, and his friend's mother went to the victim's house and checked the doors and windows because they were concerned for her. Defendant went to a neighbor's house and contacted the police, who gained entry and discovered the victim. Upon hearing this information, defendant left. Subsequently, police officers located defendant and brought him to the public safety building to obtain his statement.

On November 14, 1995, the State filed an information supplanting the complaint. The information charged defen-

dant with two counts of first-degree murder for causing the death of Betty Taft on November 8. Also on November 14, the trial court conducted a preliminary hearing and found probable cause to believe that defendant committed the two counts of first-degree murder; punishments included determinate sentences, natural-life imprisonment, and the death penalty. Defendant pleaded not guilty. The trial court set the matter for jury trial for February 5, 1996.

On January 16, 1996, defendant filed a motion to suppress statements he made at the time of his arrest. At a hearing on this motion on January 30, David Ernest, a detective with the Belvidere city police department, testified that he took part in a criminal interrogation or interview of defendant on November 8, 1995. Ernest described the physical characteristics of the public safety building and interview room. Defendant was asked general information questions, such as his name, birth date, and address. Defendant explained his association with the victim and the series of events leading up to an after the murder. Defendant told the officers that, the evening prior to the murder, he and the victim stayed up all night and talked. Earlier that evening, a woman high on crack cocaine called the victim, but defendant did not offer any further information. The next day, at approximately 12:30 p.m., defendant took a 10-minute bath while the victim remained in the kitchen. After the defendant's bath, he got dressed and asked the victim for $2 for a pack of cigarettes; the victim gave him $2.45. Then defendant told the victim he would be looking for a job and would call her if he found one. Defendant told the officers that he then went to a gas station, a Job Express, and an Oil Express, and returned to the victim's trailer at 3:45 p.m. Once he ascertained that the victim was not at the trailer or not answering, defendant drove to Capron and telephoned a friend, Tonya Weber, and informed her mother that he had not seen the victim. Defendant went back to

the trailer and waited; then went to the local Stop and Go and used the telephone. He returned to the trailer and met his friend Tonya and her mother, Madge Weber. The three of them knocked on the doors and windows of the victim's trailer, then went to a neighbor's home and called the police for a welfare check. Once the officers arrived, defendant suggested to them that the victim had been depressed and likely committed suicide.

After relating his initial version of the events, Detective Yunk read *Miranda* warnings to defendant. According to Ernest, defendant became a suspect when he failed to mention the check-cashing attempts at the banks from his narrative and his suggestion that the victim's death was self-inflicted. Defendant stated that he understood the warnings and signed a written waiver form. Ernest testified that defendant was "very cooperative" in answering all of the detectives' questions and was "very friendly." Master Sergeant Beau next questioned defendant. Beu informed defendant about the officers' knowledge of defendant's banking activities. Defendant admitted that he was at the bank and that he lied because he was scared. Defendant then told Beu that Jerome, a black man, arrived at the victim's residence and told defendant to take the victim's checks, cash them, and return with the money. Defendant could not provide any other details about Jerome other than to say that Jerome somehow knew the woman high on crack cocaine who had called the victim the night before. Upon further questioning by the officers, defendant offered inconsistent answers.

Ernest then began questioning defendant. Ernest explained that his accounts did not make sense. Ernest asked defendant whether he was a cold-blooded murderer who took advantage of a lady with the intention of murdering her and stealing her money or whether there was another reason that the officers should be aware of. Defendant told Ernest that "he just choked [the victim]";

afterwards, he put a blanket over her. He began to leave the residence, but discovered that he had no money, so he took some of the victim's checks. Thereafter, the detectives asked defendant if he would provide a written account of the events, to which defendant complied.

Defendant was also asked about his knowledge of the thermostat being turned down at the victim's residence. He told the investigators that he turned the temperature down to 60 degrees because he thought that would minimize the odor from the body. Defendant also indicated that he could not remember whether he had bound the victim with cord, but that it was possible.

On cross-examination, Ernest described his interviewing technique of defendant. Ernest stated that he urged defendant to tell him the truth. Ernest told defendant that, if he told the truth, then he had his "word on it" that, whatever defendant would tell Ernest, he would relate that to the state's attorney's office.

Scott Yunk, a detective with the Boone County sheriff's department, testified next. Yunk read into the record the *Miranda* warnings form that he read to defendant during his interview with defendant. His testimony and that of Phil Beu, Master Sergeant for the Boone County sheriff's department, generally corroborated that of Ernest.

Defendant testified that he believed he was under arrest from the moment he was escorted to the squad car at the apartment complex prior to questioning at the public safety building. He testified that during the interview, Beu told him that, if he did not admit to strangling the victim, he would be put in jail for attempted murder or aggravated battery of a police officer. He stated that Ernest promised him that, if he admitted to strangling the victim, then he would "tell the State's Attorney that he'd go easy on [him] and let [him] go." Defendant also testified that *Miranda* warnings were not given to

him until after all of his statements were given. Defendant stated that, after he gave a statement to Yunk, he told the officers that he wanted to go home. After he gave a statement to Beu, defendant told the officers that he did not want to continue with the interview.

On cross-examination, defendant testified that he understands the *Miranda* warnings, but that he did not understand them at the time he waived them. Further, in his estimation, Ernest told him before he made his statement, that, if he confessed to murdering the victim, the State's Attorney would "just let [him] walk free for this crime of murder."

After arguments, the trial court found that defendant knowingly and voluntarily waived his *Miranda* rights; that defendant voluntarily gave statements to the officers' and that the statements were made of defendant's free will and accord without fear or threats of harm and without promises or inducements of reward. The trial court accordingly denied defendant's motion to suppress.

At a hearing on March 19, 1996, the trial court allowed defendant to continue the trial date to May 6. On April 23, 1996, a status hearing was held to schedule another status date of April 30. A status hearing was held on April 30, 1996, but no motions were pending, so the parties agreed to leave the case set for trial on May 6. On May 1, 1996, defendant filed a motion requesting a fitness evaluation, stating that he is currently on prescription psychotropic medication, and that defense counsel only learned of it on May 1. A hearing was held on May 2, 1996. The trial court granted defendant's motion and appointed Dr. Terrance Lichtenwald to conduct a fitness examination of defendant.

On May 2, 1996, defendant filed a motion for appointment of a clinical psychologist to determine whether defendant was sane at the time of the offense and whether

defendant was fit to stand trial. Defendant cited to a letter from Joan Lodge, a licensed clinical social worker at Janet Wattles Center, in support of his motion. The letter states that Lodge evaluated defendant in March 1996 because he complained of "seeing bugs and worms." Defendant also informed Lodge of having poor concentration, an inability to sleep, and a family history of mental illness. Previously in 1994, defendant was diagnosed with affective bipolar disorder, depression, and was administered Depakote and Prozac. Lodge recommended that the medications be restarted. Defendant alleged that Lodge's evaluation raised a *bona fide* doubt as to his sanity at the time of the murder and his fitness to stand trial.

On May 3, 1996, a hearing was held on defendant's motion to determine whether he was fit to stand trial. Dr. Kent Hess, a physician with Swedish American Hospital, testified that he examined defendant once. Defendant had a rash around his mouth, and Hess treated him with an antibiotic. In April 1996 Hess received the letter from Lodge with her recommendation that defendant begin receiving Depakote and Prozac. Based upon Lodge's letter, Hess prescribed Depakote and Prozac for defendant.

John Hare, the jail supervisor for Boone County, testified regarding his conversation with defendant on Marcy 11, 1996. Defendant informed Hare that he was seeing bugs, hallucinating, and had trouble sleeping, and wished to speak with someone about his behavior. As a result he referred defendant for an evaluation at Janet Wattles Center. After he received the letter from Lodge, he forwarded it to Hess, who prescribed the medication for Hare to administer to defendant.

Dr. Terrance Lichtenwald, a clinical psychologist, testified that he performed an abridged fitness evaluation upon defendant. Lichtenwald reviewed defendant's behavioral records and police reports obtained from the State's Attorney's office. He also received a briefing from the Janet

Wattles Center on defendant's November 1994 records from the Riverside Medical Center (Riverside) in Kankakee. Records and findings from Riverside included defendant's intelligence classification as falling within the average range; a family history of physical abuse; and defendant's difficulty following rules and authority. Regarding any trauma to the head, Lichtenwald stated that it was possible that defendant may have received physical abuse in that form. He added, however, that defendant's alleged hallucinations did not coincide with the psychiatric definitions of hallucinations. In the 1994 Riverside evaluation, defendant complained of auditory hallucinations sounding like Halloween noises. During Lichtenwald's examination, defendant did not complain of bugs but rather that he was seeing dots. Lichtenwald stated that defendant could be experiencing visual discrepancies as a result of a detached retina or an anatomical malfunction of the eye, but because of the manner in which defendant is presenting his visual problem, Lichtenwald opined that it was not likely a psychological issue.

Lichtenwald administered to defendant a variety of tests, including the Folstein Mini Mental Status Exam; the Wide Range Achievement Test; a Slosson's Intelligence Test–revised; a verbal IQ test; the Carlson Psychological Survey; the Lawrence Psychological–Lawrence Psychological Forensic Exam; and the Personality Assessment Inventory. Lichtenwald opined that defendant's emotional affect fell within the average range considering his legal situation, but that full major depressive features were not evident. He offered a diagnostic impression of an adjustment disorder with mixed anxiety and depressed mood because defendant had indicated the symptoms began after his detainment at the jail but were not present prior to his detainment at the jail. Defendant informed him that he did not continue with his medication regime once he left Riverside. Based on the results of the tests that Lichtenwald administered, he opined that defendant was fit to

stand trial. Lichtenwald additionally stated that defendant knows who he is, where he is, and what time it is, he's able to exhibit appropriate social behavior and abilities; he understands what he is being accused of committing; he understands the penalties if he is convicted; he understands who his attorney is; he is willing to cooperate and collaborate with his attorney; to pay attention to his attorney; and that he is capable of observing, recollecting, and relating occurrences with his attorney. Lichtenwald also stated that defendant's short-term and long-term memory were acceptable.

On cross-examination, Lichtenwald opined that he performed a thorough fitness evaluation of defendant. He also stated that, during the 1994 Riverside evaluation, defendant tested positive for cocaine, cannabis, and alcohol, which could have changed his prior diagnosis. From his examination, Lichtenwald concluded that defendant did not find any manifestations of psychiatric disorders.

After hearing arguments concerning defendant's fitness to stand trial, the trial court heard defendant's other motion for the appointment of a clinical psychiatrist regarding defendant's sanity and fitness. Defense counsel admitted that he had given no notice that he intended to rely on the defense of insanity. Therefore, the trial court turned to whether the facts and circumstances of the case justified a reasonable belief that the insanity defense may be raised. See 725 ILCS 5/115-6 (West 1996). Defense counsel argued that, based on Lodge's letter from the Janet Wattles Center, he had a good faith belief that the insanity defense may be raised, and therefore, the trial court must order an examination to determine whether defendant was sane at the time he allegedly committed the murder. The trial court stated:

> "But of course now we're talking about the date of offense, not the present time, and I'm just looking

> for what is meant in the statute by reasonable facts and circumstances of the case justify a reason to believe [that defendant may rely upon the defense of insanity]."

Defense counsel then argued that testimony elicited from the fitness hearing showed that the diagnosis of defendant's condition predated the date of the instant offense to November 1994. The trial court clarified the testimony, stating that defense counsel's understanding of defendant's diagnosis was the clinical impression when defendant was first admitted; but after defendant's urinalysis, it was concluded that defendant had cocaine, alcohol, and marijuana in his blood. The trial court concluded that it would take the issue under advisement, research the applicable statute and case law, and return later with a decision.

On the issue of defendant's fitness to stand trial, the trial court found that defendant was able to understand the nature and purpose of the proceedings against him and to assist in his own defense. The trial court concluded that defendant was fit to stand trial. On defendant's motion to appoint a clinical psychologist regarding defendant's sanity and fitness, the trial court found that no notice was given that defendant intended to rely upon the defense of insanity or that of guilty but mentally ill. The trial court held that the facts and circumstances of the case did not justify a reasonable belief that the insanity defense may be raised and denied defendant's motion.

The trial commenced on May 8, 1996. The State called several employees of the Belvidere Bank, who all testified that, on November 8, 1995, defendant presented checks to the bank or one of its two branch offices, for payment. The checks were made payable to defendant in amounts ranging from $50 to $950, drawn on the victim's checking account, and purportedly signed by the victim. The employees compared signatures from the checks and the signa-

ture card, determined that they did not match, and refused to honor the checks. When told that the bank could not reach the victim for approval, defendant explained that the victim was home sleeping; he also told them that she was not at home, but rather down south visiting defendant's brother in the hospital. Defendant also indicated to the bank employees that he needed the money to pay the victim's car payment and her lot rent. Defendant explained that the victim could not make the payment herself because she was en route to Missouri to visit his brother in the hospital. Evidence was also introduced from a security camera that showed defendant presenting checks at the bank at various times from approximately 2:40 p.m. to 4 p.m.

David Ernest, a detective with the Belvidere police department, testified that, as a result of his conversation with the vice-president of the Belvidere Bank, he went to the victim's home, the crime scene. Ernest, Master Sergeant Beu and Detective Scott Yunk decided to locate defendant for an interview. Ernest testified that, at the time defendant was brought into the station, he was simply a witness, one of the last individuals to see the victim alive. Ernest was also concerned whether defendant forged the checks or whether he actually had permission to cash them. Ernest testified that defendant gave an accounting of his whereabouts, but omitted any mention of the check-cashing attempts. Yunk read to defendant *Miranda* warnings, to which defendant acknowledged and signed.

Phillip Beu, a Master Sergeant, then questioned defendant regarding his version of the events. Defendant admitted lying earlier and offered another account of his whereabouts, including the check-cashing attempts. Defendant told them that, upon his return to the victim's home from the bank, he saw a black man named Jerome driving away from the trailer.

Ernest recounted that he questioned defendant next. Ernest told defendant that he was not being truthful to the officers, and they wanted to know whether he had planned the murder or if it had "just happened." Defendant responded, stating that he just choked her," that he picked up a cord from the floor, choked the victim, and covered her body with a blanket up to her face. Defendant left the bedroom, shut the door, and went into the kitchen. Defendant realized that he had no money, so he went into the victim's desk and retrieved some of her checks.

When asked by Ernest whether defendant knew what he did was wrong, defendant replied affirmatively. Upon returning to the victim's residence from the bank, defendant went to a friend's, Cathy Oldham's place of employment and left a note on her vehicle. Defendant returned to the victim's residence and left again to go to the local Stop-and-Go; he called another acquaintance, Tonya Tennant and arranged for her to meet him at the victim's residence. Defendant agreed to provide a statement to the officers, which was placed into evidence. After the statement was prepared, defendant admitted to the officers that he adjusted the thermostat in the victim's residence to 60 degrees to minimize the odor from the body.

Tonya Tennant testified that she became acquainted with defendant through a personal advertisement. In September 1995 she and her mother, Madge Weber, met defendant. They arranged for him to stay the weekend, but they stay lasted for approximately one and one-half months. On a Sunday in October, Tennant informed defendant that he had to leave their residence. Tennant testified that defendant became angered and choked her for approximately two minutes. The following Thursday, defendant asked Tennant if she would ask the victim on his behalf if she would take in defendant.

Tennant also testified that defendant telephoned her on November 8, 1995, between 5 p.m. and 5:30 p.m. De-

fendant was looking for the victim, so Tennant and Weber met defendant at the victim's residence. The three knocked on all the doors and windows of the residence, but no one answered. They went to a neighbor's residence and called the police. While they were waiting for the police, defendant told Tennant that, because "all [of] the contents of his wallet were missing, he was going to say he was Steve Weber." Tennant and Weber both said, "I don't think so."

On cross-examination, Tennant testified that she did not tell the police about the choking incident in her statement to the police on November 9, 1995. On redirect, Tennant testified that, on November 8 at approximately 9:30 p.m., defendant wrote a note to Cathy Oldham at Tennant's residence. The note requested that it was urgent for Oldham to come to Tennant's residence. The note was later left on Oldham's vehicle. Tennant also recalled a conversation in April 1996 with defendant in which defendant admitted that the victim did not have a knife, that he made that up because he needed something quick that he could use as an excuse.

Cathy Oldham testified that, on November 7, 1995, at approximately 1:30 p.m., she dropped off defendant at the victim's residence and left for work. At 12:30 p.m. the next day, defendant telephoned Oldham that he was going to look for a job and would use the victim's vehicle. Defendant called Oldham again at 5 p.m. and informed her that the victim had kicked him out of her home, he was using the victim's neighbor's car, and that he had put a note on Oldham's vehicle. Defendant called Oldham again at approximately 8 p.m. and asked whether she was going to see him. She left work at 11 p.m. and found another note on her car from defendant.

Sandra Moore testified that she was working as an assistant manager at Stop-and-Go on November 8, 1995. Between 7 p.m. and 8 p.m., Tennant, Weber, and defendant

came into the store. Tennant was "hysterical," Weber, was crying, and Tennant informed her of the victim's death. She noticed that defendant was not crying; he would not make eye contact; he would pace the floor; and after approximately three minutes, defendant left the store.

Neighbors of the victim wee called to testify. They all testified that, between 1:30 and 2:30 p.m. on November 8, 1995, they saw defendant knocking on the door and windows of the victim's residence.

Dennis Sturges, a sergeant with the Boone County sheriff's department, testified that he and Officer Loofboro, a deputy sheriff from the sheriff's department, were dispatched to perform a welfare check on the victim. The victim's residence was locked and ultimately they broke a window in a door to gain entry. They discovered a locked door with towels stacked and covering the vent in front of the door. They gained entry to that room and discovered the victim. They found a cord wrapped tightly around the neck of the victim with a knot in the middle of her neck. Sturges then called the paramedics. He also notice that the room temperature in the residence was quite cool. Loofboro also testified, corroborating the testimony of Sturges.

Perry Gay, a sergeant and crime scene technician for the Boon County sheriff's department, investigated and processed the crime scene. Gay noted the thermostat of the residence had been turned down, the telephone in the living room was unplugged and towels to the room where the victim was found were stacked in front of the door, sealing the crack along the bottom of the door as well as covering the vent area. Gay described the condition of the victim–she was lying upon the bed on her back; she was nude, except for a bandana around the top of her head; her wrists and ankles were tied; and a cord was wrapped tightly around her neck. There was a pillow over the victim's face, and the cord extended up over the

pillow and then was tied to the right corner post of the bed, continuing to a wooden quilt-type rack next to the headboard. A cord was wrapped tightly around her ankles; another bound her wrists; and another cord connected her ankles and wrists. Gay described the cords as extension cords and appliance cords. Gay noticed knots at the ankles, wrist, and several different knots throughout the cord around the victim's neck.

Gay also testified that the victim had a bruising in the area of her right eye, a circular bruising area on her left breast, and a bruising partly on her left chest. Gay discovered a plastic mallet in the area between the mattress and the box spring, and noted that it appeared to be similar in circumference of the injury to the victim's breast and chest.

Dr. Larry Blum, a forensic pathologist, performed the autopsy upon the victim. He described the ligatures around the victim's neck, wrists, and ankles. Blum opined that a moderate amount of force was used in placing the ligatures, and that they were placed on the victim before her death. Blum also noted additional bruises on the victim's body, including the front and back of her hands, elbows and the left breast, and opined that they were all caused while she was still alive. Blum also found the size of the mallet head to be similar to the size of the bruise under the victim's left breast. Based upon his examination of the victim, Blum opined that she died of asphyxia due to a ligature strangulation.

Edward Rottman, a latent print examiner for the Illinois State Police Rockford crime laboratory, testified regarding his examination for latent fingerprint evidence. Rottman was able to lift and examine two prints from the plastic mallet. He determined that the prints from the mallet matched defendant's prints.

Officers Beu and Yunk also testified for the State; their testimony was consistent with that of Detective Ernest.

Both sides rested. Thereafter, the jury heard closing arguments and the instructions of the court. The jury returned from deliberations and found defendant guilty of first-degree murder. The trial court entered judgment on the verdict and set a date for sentencing.

On September 4, 1996, the trial court denied defendant's posttrial motion and set the matter for sentencing. At a hearing held on September 19, 1996, the trial court found that the victim's murder was accompanied by exceptionally brutal behavior and by heinous behavior indicative of wanton cruelty. The trial court also found that the murder was committed in a cold, calculated, and premeditated manner; that the public needed to be protected; that it was necessary to prevent the recurrence of this type of event; that defendant is a personal threat to the safety of the community; and that defendant was not likely to be rehabilitated. The trial court sentenced defendant to natural life imprisonment without the possibility of parole.

On October 3, 1996, the trial court denied defendant's motion to reconsider sentence. Defendant timely appeals.

We initially address defendant's contention that the trial court should have suppressed his confession because it was the product of police promises of support. Defendant argues that the promise of support occurred when Ernest told defendant that he would "stand behind" him and relay defendant's account to the State's Attorney's office. Defendant further contends that the standard of review we should employ is *de novo*, and cites to *Ornelas v. United States*, 517 U.S. ___, 134 L. Ed. 2d 911, 919, 116 S. Ct. 1657, ___ (1996), and *In re D.G.*, 144 Ill. 2d 404 (1991), in support of his proposition.

In *People v. Oaks*, 169 Ill. 2d 409 (1996), our supreme court discussed the proper standard of review of a trial court's finding on a question of the voluntariness of a

confession. The *Oaks* court noted that the determination of voluntariness generally involves resolving factual discrepancies and conflicts of credibility between witnesses which is best left to the trial court. *Oaks*, 169 Ill. 2d at 447. The record in the *Oaks* case contained both a videotape and a transcript of the interrogation, and neither the facts nor the credibility of witnesses was at issue. *Oaks*, 160 Ill. 2d at 447. The *Oaks* court concluded that the voluntariness of the defendant's statement was a question of law and considered it *de novo*. *Oaks*, 160 Ill. 2d at 447-48.

In the present case, the record contains neither a videotape or a transcript of the interrogation proceedings. Furthermore, credibility of the witnesses is an issue. Therefore, we decline to adopt a *de novo* review of the voluntariness of defendant's confession in this case and will use the established standard of review in examining the trial court's finding.

Persons subjected to custodial police interrogation regarding matters that might tend to incriminate them are entitled to the procedural safeguards outline in *Miranda v. Arizona*, 384 U.S. 435, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). Specifically, they, must be warned, prior to questioning, that they have a right to remain silent, that any statement made may be used as evidence against them, and that they have a right to counsel either retained or appointed. These rights may be waived, if the waiver is made knowingly and intelligently. *Miranda*, 384 U.S. at 475, 16 L. Ed. at 724, 86 S. Ct. at 1628. The determination of whether an intelligent waiver of the right to counsel has been made must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. E. 1461, 1466, 56 S. Ct. 1019, 1023 (1938). Our supreme court has held that a valid relinquishment of the right to counsel is not dependent on an express waiver.

When individuals have been admonished of their rights and indicate that they understand them, offering a statement without requesting an attorney is evidence that they have chosen to waive a known right. *People v. Pittman*, 55 Ill. 2d 39, 52 (1973).

When determining whether a statement has been voluntarily given, our court looks to the "totality of the circumstances." *Oaks*, 169 Ill. 2d at 451. "The test of voluntariness is whether the statement was made freely, voluntarily and without compulsion or inducement of any sort, or whether the defendant's will was overcome at the time [she or] he confessed." *People v. Miller*, 173 Ill. 2d 167, 181 (1990), quoting *People v. Clark*, 114 Ill. 2d 450, 457 (1986). Factors to be considered include the age, education, and intelligence of the accused, the duration of questioning, and whether the accused was informed of her or his constitutional rights or was subjected to any physical punishment. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 36 L. Ed. 2d 854, 862, 93 S.Ct. 2041, 2047 (1973); *People v. Martin*, 102 Ill. 2d 412, 427 (1984). Other relevant factors of individual characteristics include emotional characteristics, previous experience with the criminal justice system, and whether the confession was induced by police deception. *People v. MacFarland*, 228 Ill. App. 3d 107, 117 (1992). Relevant factors related to the nature of the interrogation include whether defendant was subjected to physical punishment, offers of leniency, other offers or promises that induce the confession, falsely aroused sympathy, prior refusals to answer questions, and whether defendant was informed of his constitutional rights. *MacFarland*, 228 Ill. App. 3d at 117. No single fact is dispositive; the question must be answered on the facts of each case. *Brown v. Illinois*, 422 U.S. 590, 603, 45 L. Ed. 2d 416, 427, 95 S. Ct. 2254, 2261 (1975); *People v. Melock*, 149 Ill. 2d 423, 447-48 (1992). We note that in reviewing the trial court's finding, we may consider the entire record,

including trial testimony. *People v. Gilliam*, 172 Ill. 2d 484, 501 (1986), citing *People v. Stewart*, 104 Ill. 2d 463, 480 (1984).

The trial court must initially determine whether a defendant has been properly admonished of his fifth amendment rights and whether he knowingly, intelligently, and voluntarily waived these rights. In making its decision, the trial court does not have to be convinced beyond a reasonable doubt, and its findings will not be disturbed unless they are against the manifest weight of the evidence. *People v. Garcia*, 165 Ill. 2d 409, 422 (1995).

That being said, we turn now to the particular circumstances surrounding defendant's statement. Defendant argues that the police induced defendant to confess when Ernest told defendant that he would "stand behind" him and relay defendant's account to the State's Attorney's office. Defendant's testimony at the suppression hearing included his version of what Beu told him, *i.e.*, if he did not admit to strangling the victim, he would be put in jail for attempted murder or aggravated battery on a police officer. His testimony also reflected his interpretation of what Ernest told him, that is, Ernest promised him that, if he admitted to strangling the victim, then he would "tell the State's Attorney that he'd go easy on [him] walk free for this crime of murder." The trial court found that defendant knowingly and voluntarily waived his *Miranda* rights; that defendant voluntarily gave statements to the officers; that the statements were made of defendant's free will and accord without fear or threats of harm without promises or inducements of reward.

In the present case, defendant was read the *Miranda* warnings and was neither subjected to a lengthy interrogation nor physically abused or threatened. The record reflects that defendant has a tenth-grade education, is literate, and that he understood his constitutional rights and the questions he was asked, as well as his own

written statement. We note that defendant testified that he was led to believe that, in exchange for his cooperation in the form of a confession, he would not be prosecuted. However, we agree with the trial court that no implicit or explicit promise of leniency or mitigation of punishment occurred. If defendant had a hope of leniency, that hope sprouted from the seeds of his own planting and is insufficient to render the resulting confession inadmissible. At most Ernest's statement was to encourage cooperation with the courts and law enforcement agencies. "General encouragement to cooperate is far different from specific promises of leniency." *United States v. Pelton*, 835 F.2d 1067, 1073 (4th Cir. 1987).

Defendant chose to speak. In the words of the Supreme Court, "it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled." *United States v. Washington*, 431 U.S. 181, 188, 52 L. Ed. 2d 238, 245-46, 97 S. Ct. 1814, 1819 (1977). Based on the facts and circumstances presented, we find that the evidence clearly demonstrates that the trial court's finding that defendant was properly advised of his rights and knowingly and intelligently waived them was not against the manifest weight of the evidence.

Defendant's second contention is whether the trial court erred in finding him fit to stand trial. Defendant argues that the fitness examination, conducted in one day with a hearing on it the following day, is unworthy of credence. Defendant concludes that the trial court's finding was hastily made, and therefore, erroneous. Defendant also suggests that our standard of review is *de novo* (*Ornelas v. United States*, 517 U.S. ___, 134 L. Ed. 2d 911, 919, 116 S. Ct. 1657, ___ (1996).

Our supreme court recently reaffirmed its position on the standard of review of a trial court's ruling on the issue of defendant's fitness to stand trial. See *People*

v. Cortes, 181 Ill. 2d 249 (1998). The *Cortes* court employed the "manifest weight of the evidence" standard in reviewing the lower court's determination regarding the defendant's fitness to stand trial. See *Cortes*, 181 Ill. 2d at 276-77, citing *People v. Haynes*, 174 Ill. 2d 204, 226 (1996). This is the standard we will apply in the present case.

A statutory presumption exists that a defendant is presumed fit to stand trial unless, because of a mental or physical condition, that defendant is unable to understand the nature and purpose of the proceedings or to assist in her or his defense. 725 ILCS 5/104–10 (West 1996). When facts are brought to the trial court's attention that raise a *bona fide* doubt as to defendant's fitness, the trial court has a duty to order a fitness hearing. *People v. Thomas*, 246 Ill. App. 3d 708, 711 (1994). Whether a *bona fide* doubt exists rests within the discretion of the trial court (*Thomas*, 246 Ill. App. 3d at 712), because the trial court is in a better position to observe and evaluate defendant's conduct (*People v. Guttierez*, 271 Ill. Appl. 3d 301 (1995)).

The first suggestion that there may have been a *bona fide* doubt as to defendant's fitness occurred on May 1, 1996, when defense counsel received an additional discovery document from the State, Lodge's letter from the Janet Wattles Center. Defense counsel filed a motion requesting permission to engage an expert to determine whether defendant was fit to stand trial. At a hearing held the next day, the trial court granted leave, an expert was retained, and defendant submitted to an examination.

Defendant argues that Dr. Lichtenwald failed to provide a meaningful examination of defendant. As a result, the trial court's finding of fitness was hastily made, and therefore, erroneous. We initially note that defendant failed to cite any authority in support of his argument, in violation of Supreme Court Rule 341(3)(7)

(Official Reports Advance Sheet No. 13 (June 18, 1997), R. 341(e)(7), eff. July 1, 1997) (stating that the argument "shall contain the contentions of the appellant and the reasons therefore, with citation of the authorities and the pages of the record relied on).

The fitness hearing was held on May 3. Dr. Lichtenwald testified regarding his examination upon defendant. Lichtenwald reviewed defendant's behavioral records and police reports. He also received the letter from Lodge regarding defendant's November 1994 records from Riverside. Lichtenwald administered and evaluated a battery of tests upon defendant. Based on the results of the tests that Lichtenwald administered, he opined that defendant was fit to stand trial. Lichtenwald testified that he performed a thorough fitness evaluation of defendant.

After taking the issue of defendant's fitness under advisement, the trial court found that defendant was able to understand the nature and purpose of the proceedings against him and to assist in his own defense and concluded defendant was fit to stand trial. The credibility and weight to be give expert testimony ae for the trier of fact, and the ultimate issue as to defendant's fitness to stand trial is for the trial court, and not the experts. *People v. McMillen*, 281 Ill. App. 3d 247, 250 (1996). We note that Lichtenwald's report and testimony comported with the statutory requirements (see 725 ILCS 5/104–15(a)(1) (West 1996)) and provided an inclusive evaluation for the trial court. Contra *People v. Harris*, 113 Ill. App. 3d 663 (1983) (holding that the trial court erred in failing to order a hearing on the defendant's fitness to stand trial when the psychiatric report was entirely conclusory and failed to provide a meaningful evaluation of the defendant's fitness in that it was hastily performed on the morning of the sentencing hearing). We also note that the trial court had ample opportunity to observe defendant as well, including observing defendant at his motion

to suppress hearing, in which defendant testified. Inasmuch as the trial court's finding was amply supported by the record, we will not disturb the trial court's determination that defendant was fit to stand trial.

Defendant's third issue on appeal is whether the trial court should have appointed a physician to examine him on the issue of his sanity at the time of the offense. Defendant filed a motion on May 2, 1996, requesting such an appointment after receiving Lodge's letter from the Janet Wattles Center. Defendant argues that his motion alleged a *bona fide* doubt of defendant's sanity at the time of the murder based on the contents of Lodge's letter. The letter states that Lodge evaluated defendant in March 1996 because he complained of "seeing bugs and worms." Defendant also informed Lodge of having poor concentration, an inability to sleep, and a family history of mental illness. The letter further notes that defendant was previously diagnosed with affective bipolar disorder, depression, and was administered Depakote and Prozac. Lodge recommended in her letter that the medications be restarted.

At the hearing, the trial court reviewed the relevant portion of the statute and asked whether defense counsel had given any notice that he intended to rely on the insanity defense. Defense counsel admitted that he had given no notice that he intended to rely on the defense of insanity. Therefore, the trial court addressed whether the acts and circumstances of the case justified a reasonable belief that the insanity defense may be raised. See 725 ILCS 5/115–6 (West 1996). The trial court stated:

> "But of course now we're talking about the date of offense, not the present time, and I'm just looking for what is meant in the statute by reasonable facts and circumstances of the case justify a reason to believe [that defendant may rely upon the defense of insanity]."

The trial court, apparently undecided, concluded that it would research the statute and case law and return later with a decision. Later, in making its rulings, the trial court found that no notice was given that defendant intended to rely upon the defense of insanity or that of guilty but mentally ill. The trial court then determined that the facts and circumstances of the case did not justify a reasonable belief that the insanity defense may be raised and denied defendant's motion.

The specific authority to order a psychiatric examination for purposes of determining whether defendant was sane at the time the murder was committed, with reference to the affirmative defense of insanity, is founded on statute. Section 115–6 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115–6) (West 1996)) provides:

> "If the defendant has given notice that he may rely upon the defense of insanity *** or if the facts and circumstances of the case justify a reasonable belief that the aforesaid defenses may be raised, the Court shall *** order the defendant to submit to examination by at least one clinical psychologist or psychiatrist ***." 725 ILCS 5/115–6 (West 1996).

The statute establishes the procedures in a criminal proceeding with respect to a court-ordered examination when it appears that a defendant may raise the affirmative defense of insanity. Section 115–6 is invoked and "only required in cases in which the insanity defense *** is at issue." *People v. Harlacher*, 262 Ill. App. 3d 1, 7 (1994). Because defendant in the present case gave no notice, the trial court looked to the facts and circumstances in determining whether the insanity defense might be raised.

Defendant relies on *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985), as support for his assertion that he, as an indigent defendant, was deprived of his constitutional rights to the appointment of a psych-

iatrist. In *Ake*, the United States Supreme Court held that an indigent defendant has a constitutional right to the appointment of a psychiatrist under certain circumstances. Specifically, where a defendant makes a preliminary showing that his sanity is a significant factor, a defendant must be permitted access to a psychiatrist. *Ake*, 470 U.S. at 74, 84 L. Ed. 2d at 60, 105 S. Ct. at ___. We find *Ake* inapplicable to the present case. Here, defendant's sanity was never a factor, much less a significant factor. The State did not order psychiatric care to bolster its case, nor did defendant ever raise the defense of insanity. Further, we acknowledge that defendant did have access to psychiatric care, as he had been previously examined by Lichtenwald and Lodge. *Cf. People v. Johnson*, 154 Ill. 2d 356, 370 (1993).

Where no constitutional rights are implicated, the decision to appoint such an expert rests within the sound discretion of the trial court. *People v. Hall*, 157 Ill. 2d 324, 339-340 (1993). The trial court presided over hearings conducted within a five to six-month time span. At the suppression hearing, the trial court heard Officer Ernest describe defendant's demeanor the evening of the murder as "very friendly" and "very cooperative." Although defendant may have been friendly and cooperative, he also gave three inconsistent accounts of the events leading up to and after the murder. The trial court also had an opportunity to determine defendant's credibility when he testified at the suppression hearing and offered his account of the circumstances surrounding his accounting of the murder and the treatment he received from the officers. Although defendant's testimony at the suppression hearing could be construed as somewhat abnormal (if he admitted to strangling the victim, then the State's Attorney would go easy on him and let him go), we are mindful that, when reviewed in its context, the hearing was on a motion to determine the voluntariness of de-

fendant's statement and whether Ernest offered defendant any promise of leniency. The trial court reviewed pleadings and evidence, including the letter from Lodge, and observed the demeanor of defendant over the course of the proceedings. The trial court ultimately decided that an expert was not required because the facts and circumstances did not present a reasonable belief to it that the insanity defense may be raised. After our careful review of the record, we find that the trial court did not abuse its discretion in denying defendant's motion to appoint a psychiatrist to examine whether he was sane at the time he murdered the victim.

The dissent analogizes the facts and circumstances of the present case to those found in *People v. Kegley*, 175 Ill. App. 3d 335 (1988). In *Kegley*, the defendant was arrested outside the apartment of the person whom he had just victimized. The defendant repeatedly ordered the arresting officers to shoot him. Once subdued and at the police station, the defendant kept hitting his head and shoulders against the cells' walls and bars. The defendant was carrying drug paraphernalia and tested positive for cocaine and alcohol and had needle marks on his arm. Defense counsel indicated that it might assert the defense of intoxication and drugged condition. At a pretrial conference, the defense counsel informed the trial court that it would raise the defense of insanity. During the course of the proceedings, defense counsel filed a motion for a psychiatric examination; counsel asserted that she had interviewed the "defendant on seven occasions and that he had become 'an intense religionist to such exaggerated extent that the fervor borders on the irrational.'" *Kegley*, 175 Ill. App. 3d at 338. Defense counsel had also interviewed the defendant's relatives and friends, who corroborated her suspicions. Defense counsel filed an addendum to her motion that detailed the defendant's arrest history and medical history, includ-

ing several hospitalization for alcohol dependence and psychiatric disorders. The trial court denied the defendant's motion for an examination, but defense counsel renewed her request through the trial. The reviewing court reversed the trial court's ruling and stated that sufficient evidence existed regarding defendant's psychological problems and substance abuse that established a preliminary showing that the defendant's sanity at the time of the offense would be a significant factor at trial. *Kegley*, 175 Ill. App. 3d at 342.

At the diametrically opposite end of the spectrum in the present case, defendant voluntarily accompanied the officers to the station for questioning, was described as "very friendly" and "very cooperative," offered three different versions of his whereabouts and circumstances of the murder, and denied that he had any alcohol or chemical dependancies. Defense counsel made no indication that the defense of insanity would be relied upon at any time and did not make it an issue during trial. Defendant appeared at nearly every hearing during the course of the proceedings, where, not only the trial court, but his own counsel, could observe defendant. Both of defendant's attorneys had opportunities to interview defendant and inform the trial court of defendant's alleged mental incapacities, but did not. The record indeed reflects that defendant was hospitalized in 1994 and was prescribed medication, and that his family suffers from a history of depression and suicide, but, as the dissent acknowledges, those facts and circumstances may be insufficient to warrant the appointment of a psychiatrist. *Cf. People v. Banks*, 94 Ill. App. 3d 122, 128-29 (1981) (determining that the appointment of a psychiatrist is not mandated, even when defense counsel requests an examination of a defendant in good faith and without frivolity; holding otherwise would divest the trial court of its discretion afforded to it under the statute). We note

that our reviewing courts have not had occasion to examine a situation in which a court looked to the facts and circumstances in determining whether an expert should be appointed on the issue of a defendant's sanity. Other courts have, however. See, *e.g.*, *United States v. Castro*, 15 F.3d 417 (1994) (holding that the defendant's heroin addiction and prior confinement to a mental institution did not place the defendant's sanity in issue at the time of the offense, and therefore, did not entitle him to a psychological examination); see also *State v. McBroom*, 655 So. 2d 705 (La. Ct. App. 1995).

The trial court in the present case was not required to abandon or ignore its own observations of defendant's demeanor throughout the proceedings, particularly since defendant had taken the witness stand and testified at the suppression hearing, allowing the trial court a meaningful opportunity to review the facts and circumstances in determining whether those facts and circumstances justified a reasonable belief that the defense of insanity might be raised. Upon doing so, the trial court apparently concluded that defendant failed to establish a preliminary showing that his sanity at the time of the offense would be a significant factor at trial and denied defendant's motion. Again, we find no abuse of discretion on the part of the trial court.

Defendant's final issue on appeal is whether the court should reduce defendant's sentence of natural-life imprisonment for first-degree murder. Reviewing courts have the power under Supreme Court Rule 615(b)(4) (134 Ill. 2d R. 615(b)(4)) to reduce sentences. The determination and imposition of a sentence is a matter involving considerable judicial discretion, and our standard of review to be applied is whether the trial court abused its discretion. *People v. Shaw*, 278 Ill. App. 3d 939, 953 (1996). A term of natural-life imprisonment is authorized where a murder is accompanied by exceptionally brutal or hei-

nous behavior indicative of wanton cruelty. 730 ILCS 5/5–8–1(a)(1)(b) (West 1996). "Brutal" has been defined as including conduct that is grossly ruthless, devoid of mercy or compassion, or cruel and cold-blooded. *People v. LaPointe*, 88 Ill. 2d 482, 501 (1982). "Heinous" has been defined as including conduct that is hatefully or shockingly evil, grossly bad, and enormously and flagrantly criminal. *LaPointe*, 88 Ill. 2d at 501. A term of natural-life imprisonment is also authorized where a murder is accompanied by an aggravating factor, such as those provided in section 9–1 of the Criminal Code of 1961 (720 ILCS 5/9–1 (West 1996)).

In the present case, the trial court found that the victim's murder was accompanied by exceptionally brutal behavior and by heinous behavior indicative of wanton cruelty. See 730 ILCS 5/5–8–1(a)(1)(b) (West 1996). The trial court also found that the murder was committed in a cold, calculated, and premeditated manner. See 720 ILCS 5/9–1(b)(11) (West 1996).

Our review of the record indicates that the trial court carefully considered the evidence within the prescribed statutory framework, including the statutory factors in aggravation and mitigation, the presentence investigation, the credibility and demeanor of the witnesses, and the defendant's premeditation and deliberation. The record indicates a thorough consideration of the factors constitutionally and statutorily designated for the trial court's attention.

The record in the present case indicates that defendant, although a young man, but nevertheless attaining a history of criminal activity, acted coldly, calculated, and with deliberation to beat up, tie up, and strangle Betty Taft, and then after her death attempt to cash her checks using false statements. Defendant's role in this murder was ultimately meaningful. The choice of Betty Taft as the victim was made by defendant due to his

association and living arrangements with her. Two weeks prior to the murder and attempted check cashing, the victim took defendant into her home and offered him a place to stay because he had just been evicted from Tennant and Weber's home. Just as defendant responded by choking Tennant when she told him to leave her residence, defendant responded to the victim by choking her when she tried to evict him. After murdering Taft, defendant then took her checks and her vehicle, driving to the victim's bank and its branch offices trying to retrieve her money. The trial court was entitled to take these facts into consideration in sentencing defendant.

We find the conduct in the present case to be comparable to conduct in cases where extended term or natural-life sentences have been upheld. Betty Taft was not merely strangled, but was beaten with a mallet in her chest; the mallet was hidden between the mattresses; her ankles were bound together tightly; her wrists were bound together tightly; the binding of her ankles and the binding of her wrists were bound together; the ligature that was used to strangle her was wrapped around her throat, accompanied by a series of knots that was connected to the headboard of her bed, which was then secured to a quilt rack. Defendant had also placed a pillow over her face and covered her naked body with a blanket. In another room, defendant pulled the telephone cord from its jack. Following the strangulation, defendant turned the thermostat down and placed towels against the bedroom door, sealing the crack along the door as well as the vent, to conceal or inhibit the stench from the deceased. Beyond that, numerous defensive wounds were discovered on the victim's body. Dr. Blum, the forensic pathologist who conducted an autopsy on Ms. Taft, detailed all of the victim's injuries in his testimony. The extent of these injuries amply supports a finding of exceptionally brutal and heinous behavior. See, *e.g.*, *People v. Ratzke*, 253 Ill. App. 3d 1054 (1993).

We do not believe that the trial court can be said to have abused its discretion in sentencing defendant to natural life imprisonment without parole.

For the foregoing reasons, the judgment of the circuit court of Boone County is affirmed.

Affirmed.

HUTCHINSON, J., with THOMAS, J., concurring.

JUSTICE BOWMAN, dissenting.

I respectfully dissent. I disagree with the majority's conclusion that the trial court properly denied defendant's motion for appointment of a psychiatrist. Because I believe that there was sufficient evidence before the trial court to warrant the appointment of a psychiatrist, the trial court deprived defendant of his due process rights by denying his motion.

The majority concludes that defendant's constitutional rights were not implicated and finds *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985), inapplicable. I disagree. A defendant has a constitutional right to the appointment of a psychiatrist when he makes a preliminary showing that his sanity at the time of the offense is "likely to be a significant factor at trial." *Ake*, 470 U.S. at 74, 84 L. Ed. at 60, 105 S. Ct. at 1091. I believe that defendant made such a showing and should have been entitled to a psychiatric evaluation on this issue.

The circumstances in this case are analogous to those in *People v. Kegley*, 175 Ill. App. 3d 335 (1988). In *Kegley*, after having interviewed the defendant and his family and reviewed discovery documents, defense counsel filed a motion for psychiatric examination to determine the defendant's sanity at the time of the offenses. The trial court denied the motion. *Kegley*, 175 Ill. App. 3d at 339. Although defense counsel subsequently renewed requests for a psychiatric examination, the trial court de-

nied each of these requests. *Kegley*, 175 Ill. App. 3d at 339. The reviewing court determined that there was sufficient evidence of the defendant's psychological problems and substance abuse to satisfy the requirements of *Ake*. *Kegley*, 175 Ill. App. 3d at 342. Additionally, the reviewing court found that the trial court's failure to appoint a psychiatrist denied defendant his due process rights and constituted an abuse of the trial court's discretion. *Kegley*, 175 Ill. App. 3d at 343.

As in *Kegley*, I believe that the trial court was presented with sufficient evidence of defendant's mental health to warrant the appointment of a psychiatrist. Although defense counsel admitted that he did not provide notice that he intended to rely on the defense of insanity, he did file a motion for appointment of a psychiatrist after receiving a letter from the Janet Wattles Center which he believed raised a question concerning defendant's sanity at the time of the offense. Specifically, the letter contained information regarding defendant's mental health history. According to the letter, in 1996, Joan Lodge, a licensed clinical social worker, evaluated defendant based on his complaints of seeing bugs and worms, having poor concentration, and experiencing difficulty sleeping. Defendant had a "positive history" of mental illness in his family, including depression and suicide. Defendant also underwent a two-week inpatient psychiatric admission in 1994, during which he had complained of similar symptoms. During his 1994 admission, defendant was diagnosed with affective bipolar disorder, depression, and was prescribed medication.

Defendant's mental health history, standing alone, may not be sufficient to warrant the appointment of a psychiatrist, but when viewed in light of the unusual nature of the offense and defendant's seemingly disoriented testimony during the suppression hearing, I believe that, collectively, these facts and circumstances do present a

reasonable belief that the insanity defense could be raised. I find defendant's admission of the crime to be saturated with psychological overtones. According to defendant, when he began choking the victim, she insisted that he continue because she wanted to be with her mother. Upon her insistence, defendant choked her until she could no longer breathe. Defendant later returned to the victim's home with others to check the doors and windows out of concern for the victim he had just choked. Moreover, as the majority acknowledges, defendant's behavior during the suppression hearing could be construed as "somewhat abnormal." Specifically, defendant testified that Detective Ernest told him that if he confessed to the murder, the State's Attorney would "just let [him] walk free for this crime of murder." In light of this evidence, I believe that the trial court should have appointed a psychiatrist to determine defendant's sanity at the time of the offense.

Although the majority acknowledges that defendant received psychiatric care from Lichtenwald and Lodge, these evaluations do not serve as a substitute for a psychiatrist's assessment of defendant's sanity at the time of the offense. Moreover, Lichtenwald's examination related to defendant's fitness for trial, which has no bearing on the necessity to appoint a psychiatrist to assess the viability of an insanity defense. See *People v. Adamcyk*, 259 Ill. App. 3d 670, 676 (1994) (evidence of a defendant's fitness to stand trial is irrelevant to a determination of sanity at the time of the offense).

By denying defendant's motion for appointment of a psychiatrist, defendant was deprived of his due process rights to present evidence favorable to his defense. Under the facts presented, I cannot determine whether such evidence will be available to defendant. Accordingly, I would remand this case with specific instructions to appoint a psychiatrist to examine defendant for purposes

of determining whether he was sane at the time of the offense. If the examination discloses the existence of an insanity defense, defendant should be granted a new trial.